FILE COPY

JAN 4 1936

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1935.

No. 597.

BORDEN'S FARM PRODUCTS COMPANY, INC.,
*Appellant,*

against

PETER G. TEN EYCK, as Commissioner of Agriculture and Markets of the State of New York, et al.,
*Appellees.*

## BRIEF FOR APPELLEES.

JOHN J. BENNETT, JR.,
Attorney General of the
State of New York,

by SAMUEL KRAMER,
Special Assistant
Attorney General.

HENRY S. MANLEY,
Counsel for Peter G. Ten Eyck,
Kenneth F. Fee, etc.

SAMUEL KRAMER,
HENRY S. MANLEY,
DAVID L. WEISSMAN,
of Counsel.

CASE PRESS, INC., 535 Pearl St., N. Y. Tel. Barclay 7-2670

## SUBJECT INDEX


| | PAGE |
|---|---|
| PRELIMINARY STATEMENT | 1 |
| THE QUESTIONS INVOLVED | 6 |
| FACTS | 7 |
| A. Introduction | 7 |
| B. The background of the legislation | 10 |
| C. The history and rationale of the differential | 15 |
| SUMMARY OF ARGUMENT | 30 |
| POINT I—The differential provision, having as its aims (1) the preservation of competitive opportunities among the dealers, (2) the stabilization of conditions among the producers, and (3) the prevention of monopoly, is neither discriminatory, arbitrary nor unreasonable | 31 |
| POINT II—The plaintiff has not shown such damage traceable to the differential as entitles it to relief in equity | 49 |
| POINT III—The plaintiff is estopped from attacking the constitutionality of the differential provision | 60 |
| CONCLUSION | 64 |

## CASES CITED


PAGE

Board of Tax Commissioners v. Jackson, 283 U. S. 527, 537 ..... 31, 44
Booth Fisheries v. Industrial Commission, 271 U. S. 208 ..... 60
Borden's Farm Products Company, Inc. v. Baldwin, 7 Fed. Supp. 352 ..... 1
Borden's Farm Products Company, Inc. v. Baldwin, 293 U. S. 194 ..... 2, 6, 31
Fox v. Standard Oil Co., 294 U. S. 87 ..... 44, 45
Frost v. Corporation Commission, 278 U. S. 515 ..... 60, 62
Hurley v. Commission of Fisheries, 257 U. S. 223, 225 ..... 63
Ligett v. Lee, 288 U. S. 517 ..... 44
Lindsley v. National Carbonic Gas Co., 220 U. S. 61 ..... 31
Nebbia v. New York, 291 U. S. 502 ..... 24, 31
Ohio ex rel. Clarke v. Deckeback, 274 U. S. 392 ..... 31
St. Louis Co. v. Prendergast, 260 U. S. 469 ..... 60
Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304 ..... 31
Truax v. Corrigan, 257 U. S. 312 ..... 31
United Fuel Gas Co. v. Railroad Commission, 278 U. S. 300 ..... 60


## STATUTES CITED


New York Laws of 1933:
Chapter 158 ..... 7, 8, 9, 19, 23, 56, 59, 60, 61, 62, 64
New York Laws of 1934:
Chapter 126, Section 258-q ..... 1, 6, 8, 20, 60, 61, 62, 64
New York Laws of 1935:
Chapter 10 ..... 8
Judicial Code:
Section 266 (28 U. S. C., § 380) ..... 1
Equity Rule 70½ ..... 2
Pitcher Report (New York Legislative Document No. 114 of 1933) ..... 3, 7, 18, 27, 29, 39, 40, 41, 58

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1935.

No. 597.

BORDEN'S FARM PRODUCTS COMPANY, INC.,
Appellant,

against

PETER G. TEN EYCK, as Commissioner of Agriculture and Markets of the State of New York, et al.,
Appellees.

## BRIEF FOR APPELLEES.

### Preliminary Statement.

This is a suit in equity for an injunction to restrain the defendants from enforcing the unadvertised differential provision of the New York Milk Control Law (N. Y. Laws, 1934, Ch. 126, Sec. 258-q).

The suit was commenced on April 26, 1934, in the United States District Court for the Southern District of New York. A Court of three Judges, organized in accordance with Section 266 of the Judicial Code (28 U. S. C., § 380), denied a motion by the plaintiff for an interlocutory injunction, and granted a motion by the defendants to dismiss the bill (*Borden's Farm Products Company, Inc. v. Baldwin*, 7 Fed. Supp. 352). On appeal to this Court the decree was reversed and the case remanded for the purpose of making findings of fact and stating conclusions

(Note:—All italics, except as otherwise indicated, the briefers'.)

of law as required by Equity Rule 70½ (*Borden's Farm Products Company, Inc.* v. *Baldwin*, 293 U. S. 194).

On December 26, 1934, the District Court made an order appointing a Special Master and referring the case to him to take testimony and to report his findings of fact and conclusions of law thereon (R. 65-66). New pleadings were served and the defendants' amended answer alleged that the plaintiff was estopped from questioning the constitutionality of the act (R. 67-70). Beginning February 4 and ending March 5, 1935, testimony was taken on twelve different days and the stenographic minutes ran to over 1400 pages. The narrative statement covers 150 printed pages (R. 71-221).

The testimony adduced was addressed to three major issues of fact: (1) whether a differential in fact existed at the time milk control was first introduced in New York; (2) what the effect of the elimination of the differential provision from the law would be on the producers, dealers, consumers and the milk market in general; and (3) whether the differential provision in the law caused the plaintiff such losses as would entitle it to injunctive relief in equity.

On the first issue of fact—the pre-existence of a differential—the plaintiff relied almost exclusively on testimony of its own officers and employees and those of its allies—that is, Dairymen's League which supplies almost all of the plaintiff's needs (Finding 4, R. 283), a subsidiary of Dairymen's League, the plaintiff's own subsidiaries, etc.* The defendants on the other hand, in addition to introducing documentary evidence showing the pre-existence of a differential, called seven dealers and ten grocers,

* The plaintiff produced only three witnesses who might be called independent on the issue of the pre-existence of a differential: (1) Herman Allweyer, who retired in 1926 when he sold his business to Dairymen's League (R. 203); (2) John A. Weinsenfluh, who sold his business to the plaintiff in 1924 and was in the brewery business at the time he testified (R. 204); and (3) William J. McKay, whose applications for the 1933 licenses showed that in his own businesses (Waddington Milk Company, Arnstein Beckman Company and McKay Milk Products) he uniformly maintained a differential between his own prices and those of the plaintiff (Defts.' Ex. 15, R. 236-239; R. 86).

whose businesses were scattered throughout the city and whose experience ran back many years, and were prepared to call many more. To shorten the hearings it was stipulated at the suggestion of the Master that twenty-four other named dealers and fifty more grocers could be called by the defendants to testify to the same general effect as those already called (R. 142, 166).

The witnesses called by the plaintiff, testifying from memory, stated generally that based on their knowledge of the trade no differential existed on bottled* milk prior to the introduction of milk control. The defendants' witnesses on the other hand, relying on records some of which were actually produced and others of which were readily available (Defts.' Ex. 2, R. 231-235; R. 209-212; Defts.' Ex. 15, R. 236-239; R. 166-167), testified that a differential had always existed and that they themselves had (in the case of the dealers) actually sold and (in the case of the grocers) actually bought and resold at that differential. The plaintiff did not call one from among the 25,000 storekeepers in New York City to contradict the storekeepers called by the defendants.

The documentary evidence introduced by the defendants on this issue consisted of Table 104 appearing at page 258 of the Pitcher Report,** a communication from Professor Leland Spencer, Research Director of the Pitcher Committee and Editor of the Report, confirming the accuracy of the table (R. 186-187), and a summary of the applications for licenses filed by fifty-three dealers in New York City with the Milk Control Board when milk control was first introduced in New York (Defts.' Ex. 15, R. 236-239). The table, based on a survey made during the week of October 17, 1932 (Pitcher Report, p. 239), shows that the custom was for unadvertised grade B bottled milk to be sold in stores at a price below that of the well advertised milk and Professor Spencer states that this survey is

* One of the plaintiff's chief witnesses admitted that a differential existed on bulk (loose) milk (R. 78).

** At the hearings it was stipulated that the Master and the Court may take judicial notice of anything appearing in the Pitcher Report (R. 81).

fairly representative of tendencies and conditions in 1932 and early 1933—up to the time of milk control (R. 187). Defendants' Exhibit 15 shows that in their applications for licenses the unadvertised dealers reported that before milk control they sold their bottled milk to stores at one cent or more below the prices which the plaintiff reported in its application.

On the second issue of fact—the effect of the elimination of the differential provision—two dealers, who had sold their businesses to Dairymen's League and remained as managers of the establishments which were continued as subsidiaries of the League, testified that when in 1931 and 1932—before milk control—they attempted, under instructions from Dairymen's League, to raise their prices on bottle milk to stores to the level of those of the plaintiff, they incurred heavy losses in sales and were obliged, again under instructions from Dairymen's League, to restore the differential (R. 115, 120, 121); a third testified that he lost all of his store bottle business when he made a like attempt in 1927 (R. 142); a fourth testified that the part of his business which is in Freeport, L. I., where the differential provision does not apply, dropped from 450 to 100 cases daily after milk control introduced uniform prices and eliminated the differential previously existing in Freeport (R. 119); and some of the grocers testified that when they attempted to get the same price for unadvertised milk as for the plaintiff's, they invariably, after control as well as before, met with failure R. 159, 130).* All of the grocers were agreed that if they were compelled to sell all milk at the same price, the sale of unadvertised milk would decline to the vanishing point and the sale of well-advertised milk would be increased correspondingly (R. 130, 143, 157, 159, 161, 162, 163, 165).

The testimony introduced on this issue by the defendants went unchallenged; the plaintiff did not call a single storekeeper from among the 25,000 in New York City to testify that all milk could be sold at the same price.

* Most of the grocers apparently thought it fruitless even to try to get the same price.

The third issue of fact—the effect of the differential provision on the plaintiff—is treated in detail under Point II, *post*, and needs no consideration here.

On the testimony thus briefly sketched the Master found that a differential, both in bottled and bulk (loose) milk, in fact existed for many years prior to the introduction of milk control (Findings 66, 69, 70, R. 297-298); refused, as speculative, to find what the effect of the elimination of the differential provision would be (R. 305); concluded that the plaintiff has suffered irreparable injury; held that "the previous existence of a difference in price does not afford a reasonable and sufficient basis for a statutory differential" (R. 303); declared the provision unconstitutional; and recommended that an injunction issue (R. 299). Both sides filed exceptions to the Master's report, the plaintiff to the findings of the differential and the defendant to the refusal to find and to the conclusions of law (R. 306-311).

The plaintiff then moved in the District Court for confirmation of the report and the defendants opposed the application. The District Court confirmed the findings of fact made by the Master; made two additional findings (71 and 72) to the effect that the independent milk could not be sold at the same price as the well advertised and that consumers when offered both at the same price preferred the well advertised brands; overruled the Master's conclusions of law; made its own conclusions declaring the provision constitutional and denying the prayer for an interlocutory and a final injunction; and dismissed the bill on the merits (R. 320-322). The plaintiff now appeals to this Court. The opinion of the District Court, which is printed in the record (R. 312-320), is reported in 11 Fed. Supp. 599.

---

The plaintiff several times in the course of its brief in this Court assails the findings without examining or weighing the evidence supporting them. For example, at page 7 of its brief, the plaintiff states that the differential

findings were the subject of a mass of conflicting evidence and if taken without appropriate qualifications are misleading "and clearly contrary to the evidence". Again, at page 48, it states that the Master "extricated" these findings from "confusion" and that they do not amount to a clear showing of a differential. Since the plaintiff does not deign to consider the evidence upon which these findings are based, we have limited our survey of the facts to the brief sketch above given.

## The Questions Involved.

Three questions are presented by this suit: (1) whether Section 258-q is constitutional; (2) whether the plaintiff has shown such damage as to entitle it to injunctive relief; (3) whether the plaintiff is estopped from maintaining this suit.

(1) On the question of constitutionality, it is only necessary at this juncture to remark that this Court when the case was here before did "not pass upon the ultimate question of the constitutionality of the statute" (293 U. S. at p. 213). This Court's answer to the defendants' argument "that the fixing of the differential was an effort to continue a condition which had obtained before the Milk Control Law was enacted; that, previously, milk of the independent dealers had sold at lower prices than the milk of the well known brands; that in establishing price control, the Legislature sought to preserve opportunities in competition which in actual practice the independent dealers had thus enjoyed and to prevent their trade from being destroyed by the operation of a scheme of uniform prices" (p. 207) was: "The factual basis of this contention is disputed and there are no findings disclosing it. Appellant asserts that there was not at any time any customary or accepted difference in price between the milk sold by it under its trade name and the milk of its competitors who are now favored by the fixed differential.

* * * For the present purposes, it is sufficient to say that these arguments are addressed to particular trade conditions in the City of New York, which largely lie outside the range of judicial notice" (p. 208). The tenor of the whole opinion, as we read it, does not preclude the conclusion that if the Court had found this "factual basis"—the pre-existence of a differential—it would have declared the provision constitutional and affirmed the decree of the lower Court.

(2) On the question of damages, the defendants will contend that the plaintiff has not shown such damage traceable to the differential as to entitle it to relief in equity.

(3) On the question of estoppel, the defendants will contend that, having applied for and received a license, having availed itself for one year of the benefits of the law and having encouraged the crystallization of conditions under it, the plaintiff is estopped from questioning the constitutionality of the differential provision.

## Facts.

### A. Introduction.

"A serious decline in the price of milk beginning in the year 1931 resulted in producers receiving for their milk a price less than the cost of production. In order to meet the emergency created by this situation a joint legislative committee known as the Pitcher Committee was appointed by the New York Legislature by resolution adopted March 10, 1932 * * *. Early in 1933, the Committee made a report, subsequently printed as New York Legislative Document No. 114 of 1933, commonly called the Pitcher Report" (Finding 2, R. 282).

On April 10, 1933, the Legislature enacted what will here be referred to as the 1933 Milk Control Law (Ch. 158

of N. Y. Laws of 1933). It created a Milk Control Board to continue until March 31, 1934, with power to fix by official order the minimum wholesale and retail prices to be charged for milk handled within New York State for fluid consumption, including prices to be charged by milk dealers to stores and the prices to be charged by stores to consumers except for consumption on the premises. In 1934 the Legislature re-enacted for a year substantially the same provisions in what will here be referred to as the 1934 Milk Control Law (Ch. 126 of N. Y. Laws of 1934). The 1934 Law is continued in effect until March 31, 1936, by Chapter 10 of N. Y. Laws of 1935. Testimony concerning the hearings, discussions and debates relating to the amendment and passage of these bills was given by legislators and others and is covered by the findings and discussed in detail later in this brief.*

The provision which the plaintiff challenges in this suit is the last sentence of Section 258-q of the 1934 Law, which is substantially a re-enactment of Section 317-c of the 1933 Law. It reads as follows:

> "It shall not be unlawful for any milk dealer who since April tenth, nineteen hundred thirty-three, has been engaged continuously in the business of purchasing and handling milk not having a well advertised trade name in a city of more than one million inhabitants to sell fluid milk in bottles to stores in such city at a price not more than one cent per quart below the price of such milk sold to stores under a well advertised trade name, and such lower price shall also apply on sales from stores to consumers; provided that in no event shall the price of such milk not having a well advertised trade name, be more than one cent per quart below the minimum price fixed for such sales to stores in such a city."

---

* The admission of this testimony was clearly proper. "While the general rule precludes the use of these debates to explain the meaning of the words of the statute, they may be considered as reflecting light upon the general purposes and the evils which it sought to remedy" (*Humphrey's Executor* v. *United States,* 295 U. S. 602, 625). No official records of these hearings, discussions and debates were kept (R. 304).

On May 5, 1933, acting under the differential provision of the law, the Milk Control Board by order designated the plaintiff, Sheffield Farms Company, Dairymen's League Cooperative Association and M. H. Renken Dairy Company as dealers having well-advertised trade names for the purposes of the differential. The order, unamended, is still in effect and the plaintiff has made no objection to being included (Finding 45, R. 292). At all times while minimum prices were fixed, "bottled milk of the independent dealers has been sold to and by stores in New York City at 1¢ per quart below the price of the bottled milk of the plaintiff and other well-advertised dealers" (Finding 46, R. 292).

In May of 1933 the plaintiff filed an application for a license under the 1933 Milk Control Law. In the application, "plaintiff agreed to comply with all rules and orders to be made by the Milk Control Board. On August 15, 1933, a license was issued to the plaintiff which expired March 31, 1934. During the continuance of the 1933 Milk Control Law for a period of nearly twelve months, plaintiff, without formal protest, sold milk under the competitive conditions established by the differential provision.

"At no time during the period when the 1933 Milk Control Law was in effect did the plaintiff institute any action or proceeding with reference to the differential provision" (Finding 50, R. 293).

"Until June 1, 1933, bulk milk could legally be sold through stores in New York City and a large amount of Grade 'B' milk was sold in that way. On November 20, 1931, a commission, appointed by the Department of Health of New York City to study the advisability of prohibiting the sale of bulk milk to stores for resale to consumers for consumption off the premises, recommended that the sale of such milk be prohibited. Pursuant to such recommendation, the Board of Health of the said City thereafter made an order to become effective January 1, 1933, prohibiting the sale of bulk milk to stores for resale to consumers. The effective date of said order was subse-

quently deferred until June 1, 1933" (Finding 25, R. 287-288).

"In November, 1931, the majority of the independent dealers were selling some bottled milk to stores" (Finding 16, R. 285). "The transition from the sale of bulk milk to the sale of bottled milk to stores in the said City began with the publication of the said Commission's report in November, 1931, and continued until the effective date of the ban on June 1, 1933" (Finding 26, R. 288).

"Before November, 1931, plaintiff's wholesale sales of bulk and bottled milk in New York City were approximately 80% bulk and 20% bottled. By June, 1933, the percentages were reversed" (Finding 33, R. 289).

## B. The Background of the Legislation.

### (a) The Metropolitan and New York City milk markets.

In 1933 there were approximately 83,000 farmers in New York State producing milk for sale. About 31,000 of them were members of the Dairymen's League Cooperative Association and about 15,000 were members of the Sheffield Producers Cooperative Association. The rest, some 37,000, were what are commonly known as "independent" farmers (Finding 4, R. 283).

About 50 percent of the milk produced by these 83,000 farmers is sold in the Metropolitan Market which, embracing all of New York City and certain adjoining parts of New York, Connecticut and Northern New Jersey, according to the census of 1930 had a population of over 10,000,000 (Findings 4, 3, R. 283). In November, 1934, the daily average number of quarts of milk received in the Metropolitan Market was 3,430,380 (Finding 51 and Table, R. 294, 300). About 70 percent of the milk received in the Metropolitan Market is New York State milk. On this basis, the New York State farmers supplied an average of 2,401,266 quarts per day and 72,037,980 quarts per month.

According to the plaintiff's statistician, 80 percent of the milk received in the Metropolitan Market is sold in New York City (R. 97). On this basis, there were sold in New York City in November, 1934, an average of 2,744,394 quarts of milk per day. Of this, between 900,000 and 1,000,000 quarts were sold in bottles to stores (Finding 22, R. 287), and the balance, more than 1,744,384 quarts, at "retail" (house-to-house delivery) and in bulk (Finding 14, R. 285). There are about 25,000 stores in New York City which buy milk for resale not to be consumed on the premises (Finding 15, R. 285).

The plaintiff purchases approximately 90 percent of its milk from Dairymen's League. Sheffield Farms Company obtains its supply from Sheffield Producers. The milk of the independent farmers is marketed through independent dealers (Finding 4, R. 283).

(b) THE PLAINTIFF: ITS ORGANIZATION, SIZE, OPERATIONS, ETC.

The plaintiff is indirectly owned and controlled by the Borden Company. The Sheffield Farms Company is similarly owned and controlled by the National Dairy Products Corporation. These two corporations, the Borden Company and the National Dairy Products Corporation, "having vast resources and widely scattered operations, play an important part in the handling of milk in this state" (Finding 21, R. 286).

"The plaintiff was organized in 1917 to take over the route department of the Borden Company. Since its organization, numbers of firms or businesses have been consolidated with it. The plaintiff also operates through several subsidiary companies. The plaintiff, the Borden Company, and their subsidiaries operate a chain of dairy stores (nine of them in New York City) and manufacture milk products (including cheese, condensed and evaporated milk, milk sugar, powdered and malted milk, casein and related products) in addition to engaging in the 'retail'

and 'wholesale' business above referred to" (Finding 21, R. 286-287).*

The plaintiff has 24 branches in the City of New York alone. It serves approximately one-half of the 25,000 stores in the city with some or all of their milk requirements (Finding 24, R. 287).

In October, 1933, there were 200 dealers engaged in the business of selling fluid milk in New York City. The four largest, the plaintiff, Sheffield Farms Company, Dairymen's League and M. H. Renken Company, together "sold a daily average of 1,638,248 quarts of milk out of a total daily average of 2,437,795, or 67.6%" (Finding 20, R. 286). These four had "89.2% of all the retail or house-to-house routes and 32.6% of all the wholesale routes" (Finding 20, R. 286).

The plaintiff and Sheffield Farms Company alone "have 85% of the retail or house to house business, divided about equally among them" (Finding 24, R. 287). In November, 1934, the store business of bottled Grade "B" milk was divided as follows: the plaintiff slightly more than 15 percent; Sheffield Farms Company slightly more than 17 percent; Dairymen's League approximately .5 percent; M. H. Renken Company approximately 2.5 percent; the independents the balance, approximately 65 percent (Finding 22, R. 287).

(c) THE PLAINTIFF'S WELL-ADVERTISED TRADE NAME, THE EXTENT AND METHODS OF ITS ADVERTISING, ETC.

The milk sold by the plaintiff has been sold under the trade name "Borden's" since 1857 (Findings 50, 51, R. 293). The plaintiff is one of the two largest and best advertised milk dealers doing business in New York City, the other being Sheffield Farms Company (Finding 24, R. 287). The milk sold under the trade names of these two

* Further details with reference to the organization, operations, etc., of these companies, both parent and subsidiary, is given at pages 173-180 of the Pitcher Report.

companies has come to signify extra value in quality and service (Finding 31, R. 289). The plaintiff between 1931 and 1934 expended $1,470,745.24 for advertising its products in New York City and vicinity alone (Finding 35, R. 289). Between the fall of 1932 and the fall of 1933 both the plaintiff and Sheffield Farms Company conducted an advertising campaign which the findings describe as having "extolled the merit of their own milk, and warned the public against buying milk of unknown brands available at a lower price" (Finding 34, R. 289).

Photostatic copies of 26 different advertisements appearing in various leading New York City newspapers were received in evidence (Defts.' Exs. 25, 27, R. 244-250, 252-272). Some of these advertisements are announced by the following legends: "Beware of Bargain Milk"; "Pennywise is an unwise policy with Milk"; "It Pays to Buy Borden's"; "She's Always interested in trying new dishes—But she doesn't Experiment with Milk"; "She Shops around for food bargains—but not for milk." Excerpts from two typical advertisements read as follows:

"THERE ARE NO BARGAINS IN BABIES.

A bargain is something you're willing to take a chance on. No parents are willing to take a chance with their children's health. . . . You cannot afford to take chances with milk either.

Yet if it is Borden's Milk you know that quality and purity and safety are there. . . . That is why the better stores sell not 'just any' milk, but Borden's."

"YOUR EYES CAN'T TELL THE DIFFERENCE.

Most women in New York would not think of buying 'loose milk' for their families to drink. Yet many of them today are buying this very same milk in bottles—frequently at bargain prices.

How much difference is there between 'just any' milk in a bottle and a bottle of Borden's?

Plenty. Borden's Milk comes only from carefully selected dairies. Borden's employs its own full-time staff of veterinarians and is the only company in

this district whose dairy inspection work is done only by veterinarians.

* * * * * *

These are a few of the reasons why more families, more doctors, more hospitals depend on 'Borden's' than 'just any' milk. . . ."

The originals of these advertisements were from 6 by 12 inches to 10 by 12 inches and most of them contained pictures or drawings flattering to the plaintiff's milk. One of them shows a picture of the grandchildren of the President of the United States with the legend that they have "cast their vote for a daily quart of Borden's Grade A Milk" (R. 252).

As will appear later, this advertising was unfair in its assumption of superiority and was the subject of the Legislature's consideration at the time it debated the 1933 and 1934 Laws. It is this advertising which the plaintiff in its brief seeks to justify as a mere attempt "to apprise the public of what, unquestionably, it was in the public's interest to know" (p. 43).

(d) The differential and its role.

The consumer responded gratefully to this act of disinterested public service and "stores found it to their advantage to carry those brands [plaintiff's and Sheffield's] of milk because they were so often called for by the customers" (Finding 31, R. 289). There was only one method of coping with that kind of competition: price appeal. And the finding is that that method was consistently resorted to by the independents.

"From November, 1931, to April, 1933, and for several years prior thereto, the independent dealers sold their bottled milk to stores in New York City for resale to consumers at one or more cents per quart below the price at which the advertised dealers were selling their bottled milk to stores in New York City" (Finding 66, R. 297).

And during the same period the stores did the same upon resale (Finding 69, R. 298).

We will be in a better position to appreciate the role of the differential if we examine its origin, history and rationale.

### C. The History and Rationale of the Differential.

(a) The classified price plan: its partial application before the enactment of the 1933 Milk Control Law.

For years before the enactment of the 1933 Milk Control Law the plaintiff and the Sheffield Farms Company employed in the purchase of their milk from producers what was known as the classified price plan. Under this plan the milk was paid for on the basis of the use to which the milk was put by the buyer. Generally speaking there were four use classes. Class I, which included milk used for fluid consumption, commanded the highest price; Class IV, which included milk manufactured into cheese or butter, the lowest. The price received by the producers selling under this plan was a blend of the several prices and was known as the blended price (Findings 6, 7, 8, R. 283-284). The blended price received by the producers supplying Sheffield Farms Company was somewhat higher than the blended price received by the producers supplying the plaintiff (Finding 11, R. 284).

The independent dealers did not buy their milk under the classified price plan. They paid for whatever milk they purchased at a price substantially the same as the Sheffield blended price which, as we have seen, was somewhat higher than the price paid by the plaintiff (Finding 11, R. 284). Despite this, despite, that is, the fact that the independents were paying for all the milk they purchased, a price somewhat higher than the price paid by the plaintiff for all the milk it purchased and the same price for all the milk Sheffield Farms Company purchased, the independents were able to undersell the plaintiff and

Sheffield Farms Company. The Master found, we have seen, that for several years prior to April, 1933, the independent dealers sold their bottled and bulk milk at prices below those of the well-advertised milk (Findings 66, 70, R. 297-298).

(b) THE RESULTS OF THE PARTIAL APPLICATION OF THE CLASSIFIED PRICE PLAN: THE INDEPENDENT DEALERS ENJOYED AN ADVANTAGE OVER THEIR LARGE COMPETITORS.

One of the reasons for this ability to undersell is to be found in the uses to which the respective dealers put the milk they purchased. The independent dealers sold a greater proportion of the milk they purchased as fluid (milk and cream) than the large, well-advertised dealers who converted their so-called surpluses into butter, cheese, etc. (Findings 11, 12, R. 284-285). Milk sold as milk and cream brought higher prices to the dealer than milk manufactured into cheese and butter (Finding 10, R. 284). The result was that though the independents paid the same *average* price (to use an illuminating though technically not strictly correct term) for the milk they purchased, they received a higher average price upon its resale.

This, in part, explains their ability to maintain the differential which the Master found.* It is now pertinent to inquire why it is that the large, well-advertised dealers did not, like the independents, limit their purchases more nearly to the volumes which they were able to dispose of in liquid form instead of buying volumes greater than their needs for liquid purposes and being obliged to dis-

* The plaintiff's suggestion that now that the independents have been deprived of their advantage they can no longer undersell the large dealers, is without support in the record. The dilemma which the plaintiff raises under Point II (pp. 28-29) of its brief—that either the plaintiff is getting too much for its milk or the independents not enough—is based on an assumption that what is a reasonable return to the independents is also a reasonable return to the large dealers. The differences in capitalization, costs, fixed charges, overhead, salaries, etc., etc., point to the fact that this is not necessarily so. For example, one of the plaintiff's witnesses (Beales) thought that the independents could "operate a bottling business at a lesser cost than the large dealers" (R. 125). A smaller gross may yield the same net return to the independents or *vice versa*.

pose of the surpluses at prices below the liquid form. The findings and the Pitcher Report supply the answer. "The smaller dealers generally contracted for their minimum requirements and depended upon emergency purchases when threatened with a shortage" (Finding 13, R. 285). "The large distributor cannot do this since the same percentage deficiency in volume would involve quantities too great to be obtained on short notice" (Pitcher Report, pp. 16-17, sub-finding [f]). In other words, these large dealers were subjected to an economic disadvantage because of the very fact that they are large—a somewhat paradoxical situation, since it is always their claim that their size is responsible for their advantages.

(c) THE DRIVE FOR THE UNIVERSAL APPLICATION OF THE CLASSIFIED PRICE.

So long as the market for milk continued to expand, this economic disadvantage from which they were suffering apparently caused little concern to the large dealers (Finding 28, R. 288). When the market began to shrink,* the disadvantage began to appear menacing. We get a partial, rather inadequate picture of what happened from Finding 12 (R. 285). It is there stated that the independent dealers "were able to engage very generally in price cutting which repeatedly forced the large dealers (including the plaintiff) to lower their prices so as to protect their business." What this means is, that in order to retain their volume (not mere proportion) of business in a shrinking market the large dealers sought to eliminate the effects of the differential which had always existed. Various methods of accomplishing that result were resorted to by them. They dispensed with the 5¢ bottle deposit requirement which all dealers had theretofore maintained on store sales (Finding 32, R. 289). Since this had the apparent** effect of reducing the price of their

* The extent of the shrinkage is indicated in Findings 51 *et seq.* (R. 293-298) and Pitcher Report, p. 80 *et seq.*

** At pages 38-40, *post*, we consider the true effect of this dispensation.

milk to approximately the level of the unadvertised milk (Finding 32, R. 289), the independents, in sheer self-defense, were obliged to widen the differential (Finding 68, R. 298). The large dealers then reduced prices. This they did chiefly at the expense of their producers.* As a consequence of the reduction of the prices to their producers, the blended price declined. The decline in the blended price, however, restored the advantage of the independents for it enabled them to reduce their prices still further. The victims of this competition were the producers who were soon "receiving for their milk a price less than the cost of production" (Finding 2, R. 282). They began to rebel,** and it became apparent that the large dealers would have to find some other means of eliminating the disadvantage they were suffering from. This means was the *universal* application of the classified price.

Accordingly, we find that one of the measures most urgently recommended to the Pitcher Committee by those buying under the classified price plan was that that method of purchase be applied to all dealers. For example, Mr. H. A. Cronk, the plaintiff's president, stated:

> "Each distributor, buying on this plan, would buy and pay for the exact amount of milk in each class to fill his market requirements. Since all buyers would assume the same costs for milk for the various uses, the success of each distributor would hinge upon his ability as a salesman, and his efficiency as an operator, providing they all had the same price for the milk" (Pitcher Report, p. 111).

Fair-sounding as Mr. Cronk's statement may appear, it however obscures the fact that the universal application of the classified price in effect meant that the in-

* The Pitcher Committee found that while the price paid by the producer for retail milk, of which the plaintiff and Sheffield alone sold 85 percent, declined 61 percent, the price received by the dealer declined 37 percent and the distributor's gross spread declined only 17 percent (Report, p. 15, subd. [e]). And beginning at the bottom of page 15 of its brief the plaintiff admits that the ability of independents to undersell the larger dealers forced the latter to lower the prices paid to their producers.

** The Pitcher Report, pp. 61-75, gives a graphic report of this rebellion.

dependents would have to pay for almost *all* of their purchases at a price which the large, well-advertised dealers paid for only a *part,* since the former sold in fluid form a much larger proportion of the milk they purchased than the latter, and would be deprived of the competitive advantage which their smallness bestowed upon them. Nevertheless, Mr. Cronk's suggestion that the remedy lay "not in scrapping the [classified] plan, but in its further extension"* prevailed. The bill which was drafted by the Committee and enacted into law empowered the Milk Control Board to fix the minimum prices to be paid to producers for milk depending upon its grades and *uses* (Chapter 158 of the N. Y. Laws of 1933, Section 312, subd. d), and such prices, depending upon utilization, have been fixed "ever since May 16, 1933" (Finding 47, R. 292-293).

(d) The origin of the differential provision in the Milk Control Laws.

The bill drafted by the Committee and introduced in the Legislature did not contain any provision for minimum prices to be paid by stores or consumers (Finding 39, R. 290). Consequently it contained no provision for a differential (Finding 39, R. 290). Both of these provisions (as well as others) were included by amendment later (Findings 39, 42, R. 290, 291).

Findings 40, 41 and 42 (R. 290-291) narrate in some detail how these provisions came to be included:

> "At meetings of a Committee held in the office of the Assembly Committee on Agriculture in the State Capitol on March 15 and 16, 1933, when a proposal to fix minimum prices to be charged by all dealers to stores was first discussed in connection with the pending Milk Control Bill, it was stated that uniform prices would destroy the business of all dealers except those which were well advertised.
>
> "The Committee was representative of dealers and producers, advertised and independent, and various members of the Legislature were present from time

* Pitcher Report, p. 112.

to time during its discussion on those two days. It was stated on behalf of the independent dealers that there was a custom for their milk to be sold through stores in New York City for a cent a quart less than the milk of the large advertised dealers, that they would lose their business if compelled to sell at the same price as the advertised dealers, and that this would mean a loss of outlet to their producers. Some of the newspaper advertising referred to in finding '34' was at that time shown to certain members of the Legislature.

"Subsequently, an informal conference of members of both houses of the Legislature was held to consider the pending milk bill. At that conference nearly all members were present, and Assemblyman Fitzgerald stated that the bill, as proposed, failed to maintain the competitive position then existing between the advertising and non-advertising companies, and, if adopted, would eventually raise prices to consumers.

"Thereafter the bill was amended in the Legislature to include a provision for the fixing of minimum prices; subsequently it was again amended in the Legislature to include a more detailed provision for minimum prices, specifically mentioning stores, and at that time the differential provision was also added."

The differential provision was continued in the 1934 Milk Control Law.* Finding 44 (R. 291-292) describes its re-enactment as follows:

---

* The plaintiff states in its brief (p. 6) that the Milk Control Board in its 1934 report recommending the re-enactment of the 1933 Law made no recommendation with respect to the continuance of the differential provision. Apparently the inference the plaintiff seeks to have drawn is that this action of the Board constituted a condemnation of the differential provision. Such an inference is contrary to fact. What the Board did was to propose that the Law "be continued with such amendments as are proposed in succeeding recommendations." The "succeeding recommendations" did not propose the elimination of the differential provision; in fact they made no reference to minimum prices to stores or to the differential provision (Finding 43, R. 291).

The plaintiff also makes mention of the refusal by the Director of the Division of Milk Control to recommend the enactment of the differential for 1935. The Director, the fact is, made no recommendations with reference to the differential. He did make certain animadversions on it but the Legislature saw fit to continue it. His opinion as to the alleged difficulty of enforcing the provision has no more bearing on its constitutionality than the known difficulty of enforcing the Prohibition Laws had on theirs.

"On March 23, 1934, a hearing on the bill was held before the Senate and Assembly Committees on Agriculture. Witnesses at the hearing urged that the differential provision should be included in the Law if it were continued. It was stated that milk consumers in New York City had become accustomed to paying a cent per quart more at stores for milk of Borden's and Sheffield than for milk of independent dealers, and if all dealers were required to charge the same minimum price, the public would favor the brands of milk which were widely known and widely advertised; that the very existence of the independent dealers depended upon continuance of the differential provision; that they should be maintained as a gauge of what was economy in the milk business; that to continue price fixing without the differential provision would legislate out of business the independent dealers; that in such case the independent dealers would lose all the store business and their farmers would lose their outlet and the business would be absorbed by the big companies, greatly increasing cost of milk to consumers, particularly the poorer people who bought milk at stores, and putting all producers at the mercy of the three big companies."*

(e) THE NEED FOR THE DIFFERENTIAL PROVISION.

We are now in a position to appraise the merits of the plaintiff's charge, frequently repeated, that the differential is the result of pressure brought upon the Legislature by a small, favored, selfish group. Leaving aside the fact which the District Court remarked in its first opinion that "most legislation is the result of conflicts between economic or social interests, and the Legislature is the only place

* With reference to these findings the Master made the following observation: "There being no legislative report on the amendment, I permitted members of the legislature to testify to what was said in a legislative conference and committee on the subject of a differential (Findings 40 and 41). I tried to limit the evidence to facts, but these were scanty; the testimony shaded off into opinions, and afforded little reliable information as to the reasons for the amendment" (R. 304). To us it seems clear that findings which relate what the Legislature was told are findings of fact even though the things which were said were only opinions in the sense that they were not then and there established to be true, as they were later at the hearings. And it seems equally clear that the Master had in mind opinions in that sense when he made the comment quoted.

where they can be settled", what were the independent dealers to do? In response to pressure for which, we have seen, their large competitors were in no small measure responsible, the Legislature was about to enact into law the classified price which would deprive the independents of the advantage which buying at the blended price gave them. Now, in addition, the proposal was being made to deprive them of the advantage which selling at the differential gave them. Exacting as was the burden of requiring them to pay more—on the average—for their milk than the well-advertised dealers, to require them to sell at the same price as the well-advertised dealers threatened the destruction of their business and a loss of the outlet to the producers supplying them (Findings 40, 44, 71, 72, R. 290-291, 320-321). These were the considerations which moved the independent dealers and producers—the plaintiff's small, favored, selfish group—to press for the incorporation of the differential provision in the law. We find nothing sinister in this pressure.*

The importance of maintaining the differential is shown by what the defendants' witnesses, grocers and dealers, testified and the Court below found (Findings 71, 72, R. 320-321) actually followed, and, in the witnesses' opinion, would follow their attempts to get the same price for the milk of the independents as for that of the well-advertised dealers. The witnesses, as we show in the preliminary statement, testified and the Court found that when the attempt was actually made it resulted in a serious decline in the sale of independent milk and the witnesses were unanimous that the same result would follow any future attempts to get the same price.

At the bottom of page 17 of its brief the plaintiff, making a play on words, states that the effect of the differ-

* The Court below remarked in its opinion: "The Pitcher Report had indeed recommended minimum prices and had not suggested the need of protecting the 'independents'. That meant nothing; the effect upon them of fixing a minimum might not yet have been realized. The bill originally did not include any price fixing at all; and the 'independents' had no reason for alarm; but it was amended during its passage and with the introduction of a flat price they were naturally aroused and appealed for relief. Why there should be anything sinister about their success, passes our understanding" (R. 315).

ential provision was to give the independents a "monopoly" to make a price appeal, and adds: "and, to make such monopoly the more secure, the 'independents' obtained it not only against the appellant and the other advertised dealers, but also against all dealers entering the field after the date of the enactment of the 1933 Law." No reference is made to any finding or any other place in or out of the record to substantiate the charge that the independents and not the well-advertised dealers were responsible for the time limitation. Nevertheless the charge is repeated at pages 48-49 and in other places of the plaintiff's brief. The record will not support it. Moreover, since the exclusion of newcomers from the privilege of the differential benefits the well-advertised dealers as much as the independents, it is just as reasonable to conclude that it was inserted at the behest of the well-advertised dealers.

For the same reason there is no basis for the plaintiff's assertion (at p. 48) that the time limitation was inserted to enable the independents "to preempt a definite segment of the New York City market." It is just as reasonable to conclude that it was inserted at the instance of the well-advertised dealers for the purpose of limiting the number of their competitors who could take advantage of the differential.*

(f) **The primary purposes of the differential provision:** (1) TO MAINTAIN THE COMPETITIVE POSITION BETWEEN THE ADVERTISING AND NON-ADVERTISING COMPANIES; (2) TO STABILIZE CONDITIONS AMONG THE PRODUCERS; AND (3) TO PREVENT MONOPOLY.

---

* At page 16 of its brief the plaintiff states that the independents were not content with the protection which the difference between the retail route and store prices afforded them, but "insisted that the Legislature enact the further difference which the appellant now attacks." If this statement is intended to suggest the inference that prior to the enactment of the Milk Control Law no difference between the retail route and store prices existed, it is contrary to the facts. Finding 29 (R. 288) states that "from 1931, until the enactment of the 1933 Law, prices of bottled milk sold by stores to consumers were lower than retail prices".

1. Against a finding of a pre-existing differential supported by evidence as overwhelming as is the evidence supplied by the present record, it is no longer possible to argue that the differential provision introduces into the milk industry an element which did not previously exist, an element which upsets conditions existing in a free market. It is now, on the contrary, evident that not to have enacted the differential provision would have resulted in just such an upset.

To preserve this pre-existing competitive situation was the first objective of the differential provision.

2. One of the fundamental aims of the Milk Control legislation was to insure an adequate and continuous milk supply to the consumer by so improving the farmer's economic status that he would be enabled to produce it. It was for that reason that the Milk Control Board was empowered to fix minimum prices to be paid to the producer (*Nebbia v. New York,* 291 U. S. 502). By fixing minima which were considerably higher than those previously prevailing, the condition of the producer was improved.

But this improvement depended, obviously, upon the producer's ability to market his milk. For no matter how high the prices are ordained to be, they can be of no benefit to the producer who has no outlet for his milk. It was equally important, therefore, to keep secure the producer's outlet.

Now the market of the many thousands of producers who were supplying the independent dealers depended obviously upon the continued existence of these independents. And the continued existence of these independents (whose business was almost entirely store business) depended, again obviously, upon their ability to undersell the well-advertised dealers. If the price to the consumer were to be uniform, if nothing was to be saved by buying the milk of the unknown independent, the consumer would naturally prefer the well-advertised brand of the large

dealer—the brand for which claims* of superiority were dinned into the ears of the consumer almost continuously by every form of advertising, laudatory and invidious, known to modern, high-pressure salesmanship. And the result of this artificially-created preference could only be the immediate decline of the business and ultimate elimination of the independent dealers and the destruction of the outlet of the producers who were supplying them.

Whatever may be said of the ultimate destruction of the entire independent market, there can be no doubt that the immediate result of the application of the universal classified price without the differential would be the loss of part of their market by the producers supplying the independents.** In other words, instead of improving and stabilizing conditions among the farming population, the law would have the effect of unsettling them still further. For whatever their conditions were before the law, the producers supplying the independent dealers at least had a market. The upshot of the whole business would be strikes, riots, danger of the loss of the milk supply—the very things the elimination of which prompted the legislation.

---

* The findings show that there is no basis for these claims; see, for example, Finding 30 (R. 290). The testimony shows that the same milk sold to the plaintiff was sold by the League to independent dealers to be resold under unadvertised brands (R. 81).

In the note at page 43 of its brief, the plaintiff quotes warnings from the Pitcher Report that a prolongation of the conditions under which the farmers were paid less than the cost of production *"would* inevitably have an unfavorable effect upon the quality of the milk supply". These warnings obviously lend no support to the claim made in the plaintiff's advertisements that its milk actually *was* superior to that of the independents and permit no such implications. If such implications are permissible, the differential provision has its basis in a difference in quality and is on this ground also constitutional; if they are not, the warnings do not justify the character of the plaintiff's advertising. The Court below put the matter as follows: "If that reputation tells the truth, its milk is really of a different grade, and the classification was right; if it does not tell the truth and the plaintiff has been persistently misleading the public all along, certainly the Legislature might neutralize a spurious advantage in order to protect those who have not achieved a similarly undeserved reputation" (R. 316).

** Commenting on the plaintiff's claim (considered in detail hereinafter) that the independent producers would immediately find a substitute market among the well-advertised dealers, the Court below said: "Economic processes are not so automatic; there is a friction and a lag in them which cause most of our difficulties" (R. 317).

Confirmation that this fear is no mirage is to be found in several places. In the Court below the plaintiff stated in its brief (p. 13) that "for every quart of milk by which its business increased, the plaintiff would have to purchase an additional quart from *some* producer". That may be true, but, as one of the independent farmers (Pilger) put it: "There would not be less milk sold, but less of *our* milk would be sold. * * * I know the League has continuously insisted that more than half of their volume was surplus and they could immediately turn that into fluid channels, and we independents would be holding the bag with all our fluid milk and putting it into cheese" (R. 135).*

When asked what the result of such a situation would be, Mr. Pilger replied:

> "If you take the independent farmers and deprive them of their fluid market and drive them all into cheese, with the present misery they are laboring under and general difficulties during this period you will just have another one of those cases of hell let loose, and nobody can tell where we would wind up" (R. 136).

The suggestion by one of the plaintiff's witnesses, Mrs. Meyers, a strong League partisan, that the independents could feed their milk "to the calves, feed it to hogs" (R. 201) would hardly provide a way out.

To avoid this, by enabling the independent dealers to continue to undersell the well-advertised group and thus securing their market to the independent farmers, was the second objective of the differential provision.

In the Court below, as here, the plaintiff argued that the elimination of the independent dealers would not affect the independent producers. The reason given was, as we have seen, that "for every quart of milk by which its business increased, the plaintiff would have to purchase

---

* Lazarus, a consultant in the industry of 22 years' experience (R. 137), testified that when the independent producers lost their independent (dealer) outlet, they "had to go to cheese factories or other lower forms to get rid of their milk" (R. 138).

an additional quart from some producer." But since the plaintiff and its ally, the League, were forever complaining of the surpluses with which they were burdened, it was easy to show, as Mr. Pilger did, that if the plaintiff's business were to increase at the expense of the independent dealers, the plaintiff would simply dip into its surplus for its increased requirements without having recourse to the independent producers who would in the meantime have lost their normal outlet and who, in Mr. Pilger's vivid phrase, would be left "holding the bag".

In this Court (at pp. 35-37 of its brief) the plaintiff undertakes to argue that this is not so because "during the period of lowest production" (p. 36) there is no surplus and "any appreciable increase in the appellant's business would necessitate the taking on of additional producers, since the appellant's supply in the short season would otherwise be inadequate" (bottom of p. 36). Leaving aside the fact that on the plaintiff's own showing the plaintiff would be obliged to have recourse to the independent producers' supply only in the short season, the record will not support the claim, advanced by implication in the plaintiff's argument just quoted, but explicitly at pages 9-10 of its brief, that the amount of milk produced in the period of lowest production is only adequate to provide for normal fluid demand; that is, that no surplus is produced in that period.

Mr. Pilger, we have seen, testified that the League (the plaintiff's source of supply) insisted that more than half of its volume was surplus (R. 135).* Nowhere in the record is this testimony contradicted. On the contrary, while the Pitcher Report shows that the League's claim is exaggerated, it also shows that the problem of surplus always exists, in periods when production is at its lowest as well as when it is at its highest. Speaking of this problem, the Pitcher Report states at page 39:

> "There must always be a *necessary surplus*. This is generally estimated at about 20 per cent.

* Mrs. Meyers stated that the League refused to take in additional members because it had "sufficient surplus to handle as it was" (R. 201).

> "To produce and handle milk suitable for use as fluid milk is far more expensive than to produce it for manufacturing purposes. This surplus must, therefore, be sold at a loss. But the problem is still more difficult. Farmers cannot know in advance just how much milk they will produce because the weather and other factors affect the cows. To be sure to have the *necessary surplus* farmers must take a chance of having still more if conditions should be favorable." (Italics in original.)

And Finding 9 (R. 284) states in part:

> "Under the best practicable adjustment of supply to demand, the industry must carry a surplus of about 20% in excess of fluid consumption because milk, an essential food, must be available as demanded by consumers every day in the year."

The claim advanced by the plaintiff is therefore contradicted by the record and it follows, we think, that any threat to the continued existence of the independent dealers involves the independent farmers equally with the dealers upon whom they are dependent.

3. Price control is emergency legislation. Presumably the time will come when such control will be abandoned and with it the protection of minimum prices to the farmers and maximum prices to the consumers. In other words, prices in both directions will again be determined by the least the farmer can be made to sell for and the most the consumer can be made to pay.

Now, obviously, in the absence of regulatory restrictions, one enjoying something of a monopoly is in a better position to pay as little and charge as much as he wants to than one who has competitors to reckon with. And it is clear that the universal application of the classified price without the differential would have a tendency, by reducing the business of and ultimately eliminating the independent dealers, to create just such a monopoly. To prevent the elimination of the independent dealers and the

creation of a monopoly was the third objective of the differential provision.

The plaintiff will say that the fear of monopoly is exaggerated and point to the last sentence of Finding 21 R. 287), taken from the Pitcher Report (p. 165), that "at no time in recent years has any one company had a monopoly or even near monopoly of the business of the distribution of milk in New York City," and to another sentence, quoted from page 173, that "competition in the business of milk distribution in most cities of the state is keen to the point of being wasteful and destructive."

However, the very next sentence points out that "there has been over a period of years a marked tendency toward fewer and larger distributors." And the figures given in the findings show that the fear is not exaggerated at all. Two companies now have 85 percent of the retail business and more than 32 percent of the store bottled "B" business (Findings 24, 22, R. 287). Four companies have 89.2 percent of the retail routes and 67.6 percent of all the business. An amalgamation of these businesses will make the fear a reality.*

The Master suggested in his memorandum (R. 302) that if such combination were attempted "the State could invoke the anti-monopoly provisions of the state statutes." General experience with the anti-trust laws has shown that the best way to prevent monopoly is to check its rise rather than attempt to split it up when full grown. Be-

* The Federal Trade Commission has recently, at the request of Congress, investigated the milk industry in certain localities and has reported that competition in the milk business has been eliminated in certain cities of Connecticut and various abuses created. According to the report, National Dairy Products Corporation, which indirectly owns and controls Sheffield Farms Company, acquired the two largest dealers in Hartford handling 39.3 percent of the milk, the remainder being divided among 140 small dealers. In New Haven it controlled 30.5 percent of the milk. "These figures," the report states, "show that, insofar as Hartford and New Haven are concerned, the National Dairies approaches a monopoly in those two markets."

Borden's subsidiaries were reported to sell 33.5 percent of the milk in Bridgeport, and a substantial percentage in Norwalk (House Document No. 152, 74th Congress, First Session, dated April 5, 1935, particularly pp. 40-43).

sides, there is nothing in the policy of the law to limit the State to one approach to the problem.

> "* * * Concentration of economic power has generally been watched with a jealous eye in this country. To prevent it or to break it up, rather than to regulate it after it arises, has on the whole been our preferred way; and in this instance competition between the four 'well-advertised' dealers might be thought not enough security. Many are fearful of hidden arrangements which may be made when the field is narrowed to a few. Often such suspicions are unreasonable, but they are part of that stock of beliefs on which a legislature is justified in acting. * * *" (*Borden's Co.* v. *Baldwin*, 7 F. Supp. 352.)

## Summary of Argument.

POINT I—The differential provision, having as its aims (1) the preservation of competitive opportunities among the dealers, (2) the stabilization of conditions among the producers, and (3) the prevention of monopoly, is neither discriminatory, arbitrary nor unreasonable.

POINT II—The plaintiff has not shown such damage traceable to the differential as entitles it to relief in equity.

POINT III—The plaintiff is estopped from attacking the constitutionality of the differential provision.

## POINT I.

**The differential provision, having as its aims (1) the preservation of competitive opportunities among the dealers, (2) the stabilization of conditions among the producers, and (3) the prevention of monopoly, is neither discriminatory, arbitrary nor unreasonable.**

The device of classification, with the application of different regulations for different classes, is a common device of the law. "Classification is the most inveterate of our reasoning processes" (*Truax* v. *Corrigan*, 257 U. S. 312, at pp. 337-338). The "State has a broad discretion in classification, in the exercise of its power of regulation" (*Borden's Farms Products Co., Inc.* v. *Baldwin*, 293 U. S. 194, at p. 210). Exactness in classification cannot always be obtained, and a tendency to fairness is enough, as is illustrated by *Singer Sewing Mach. Co.* v. *Brickell* (233 U. S. 304). The classification is valid unless it is "without any reasonable basis" and one who assails the classification "must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary" (*Lindsley* v. *National Carbonic Gas Co.*, 220 U. S. 61, at pp. 78-79). The statute is good so long as it does not "preclude the possibility of a rational basis for the legislative declaration" (*Ohio ex rel. Clarke* v. *Deckeback*, 274 U. S. 392, at p. 397). "The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction" (*Bd. of Tax Comrs.* v. *Jackson*, 283 U. S. 527, 537). The thought that runs through all the cases, like the burden through a ballad, is that all that a classification needs to sustain it is a showing that it rests upon some rational basis (cf. *Nebbia* v. *New York*, *supra*).

In its opinion remanding this case, this Court did not reject this test. "* * * After a full showing of facts, or

opportunity to show them, it may be found," it wrote, "that the burden of establishing that the classification is without rational basis has not been sustained" (at p. 210). Moreover, as we have already had occasion to remark, this Court did not suggest that such a rational basis was absent in this case. All it held was that since the "rational basis"—the pre-existing differential—for the classification here "is predicated upon the particular economic facts of a given trade or industry, which are outside the sphere of judicial notice, these facts are properly the subject of evidence and findings" (at p. 210).

It is against the background of these principles that the rationality of the differential provision must be judged.

A. This Court, we have said, left undecided the question whether a finding establishing the pre-existence of a differential would constitute the rational basis needed to support the provision under attack. But though the question was left undecided, we think the opinion contains a clear indication of what the decision now ought to be. As we read the opinion, this Court felt unable to uphold the provision as "an effort to continue a condition which had obtained before the Milk Control Law was enacted" (at p. 207) only because the record before it lacked the "factual basis" for such a view, and the chief, if not only, purpose for which the case was remanded was to discover whether the "factual basis" actually did exist. On a record which shows it to have existed, we think the provision should be sustained.

While it is true that the plaintiff at some points (notably under Point I, pp. 26-28, of its brief) argues that the provision ought to be condemned irrespective of whether a differential did or did not pre-exist, at other points (notably under Point III, pp. 30-33, of its brief) it argues that the differential which the Master and the Court below found is no differential at all, or, in the plaintiff's language, that the practice of the independents to sell below the well-advertised dealers was not so estab-

lished as to render it a "competitive precedent" sufficient to justify the enactment of the differential provision.

The first of these arguments has already been rejected by this Court, since, if it had been approved, this Court would not have remanded the case for proof, but with a direction that an injunction issue. This argument therefore needs no further consideration. The second of these arguments consists, as somebody has remarked, of an attempt to take the edge off the differential findings and requires examination.

Reversing the order in which the argument appears under Point III (pp. 29-33), the first part of it runs as follows: Up to November, 1931, when the Report proposing the abolition of bulk milk was published, the market was predominantly a market for bulk milk;* the market for bottled milk was a quality market (plaintiff's brief, p. 32); "it is to be inferred" that the purchases of bottle milk in stores during that period were merely "extra" and "casual"** and "insofar as the dealers were concerned bottled milk sold through stores was a nuisance" (plaintiff's brief, p. 8); therefore, "any competitive difference in price which may have existed in the old market [that is, the market before November, 1931] was no more a precedent for the statutory differential than a similar competi-

---

* Finding 16 (R. 285) shows that in 1930 approximately 25 percent of the milk sold through stores was bottled milk (7.5 percent in bottles as against 23.6 percent bulk). Assuming that the total sales through stores in 1930 were no greater than in November, 1934, when, according to Finding 22 (R. 287), approximately 1,000,000 quarts of milk were sold through stores per day, bottle sales through stores in 1930 were approximately 250,000 quarts per day.

** The plaintiff apparently bases this inference on the statement at page 8 of its brief that "the price of bottled milk was generally the same in the stores as it was on the dealers' retail routes." Aside from the fact that the Pitcher Report (Table 95, p. 248) shows that except for 1929 there always was some difference in these prices during the period 1927-1932, this statement completely ignores the existence of the differential by virtue of which a consumer purchasing a bottle of independent milk in a store saved not only the difference between the store and route price, but also the difference between the well-advertised and independent price which did not extend to route deliveries (Finding 28, R. 288).

tive difference in Philadelphia would have been" (plaintiff's brief, bottom of p. 32).*

This part of the argument ignores three vital elements in the situation prevailing in the "old" market and slurs a third. It ignores the facts that 250,000 quarts of bottled milk were sold through stores daily in that market (a quantity for which "extra" and "casual" purchases cannot alone account), that "the majority of the independent dealers were selling some bottled milk to stores" (Finding 16, R. 285) and that some of the largest of these independents, like Sunshine, were then selling bottled milk to stores exclusively, that far from being a nuisance, bottled milk composed all of their business (R. 127-128, 220); and it slurs the fact that a differential also existed with reference to bulk milk (Finding 70, R. 298).

The plaintiff argues that the differential on bulk milk is of no significance, because "it is the difference in price to the consumer that is vital, and there was none in the sale of bulk milk" (plaintiff's brief, p. 33). We should think that before control (the period of which we are now speaking), when the storekeeper was at liberty to buy at any price, the price from dealer to storekeeper was at least as vital from the point of view of the dealer as the price from the storekeeper to the consumer. And since in the sale of bulk milk the consumer could not exactly know what milk he was getting because it all came out of cans, it seems to us that it was the price to the storekeeper that was vital. The independents always had to undersell in order to sell at all.**

The second part of the argument runs as follows: After November, 1931, the market situation was highly abnor-

---

* Nevertheless, the plaintiff, without showing that the conditions obtaining in other States are comparable to those existing in New York City, urges as somehow material to the present question Finding 48 (R. 293), consistently opposed by the defendants, that no other State has included a differential provision in its Milk Control Law.

** The defendants' offer to prove that a differential had also preexisted in relation to condensed and evaporated milk between the known and unknown brands was rejected (R. 195). Defendants' Exhibit 26 for Identification (R. 251), showing that such a differential existed, was excluded and the defendants excepted (R. 195).

mal; there were constant price wars; the plaintiff and the other large dealers were reluctant to go the whole way in meeting the price cuts of some of the independents (plaintiff's brief, p. 31); "the best it could hope to do would be to pursue the 'independents' down a price-cutting spiral, with the 'independents' always one jump in the lead" (plaintiff's brief, p. 13); but rather than pursue this futile course the plaintiff dropped the 5¢ bottle deposit; the independents then reduced their prices still further (plaintiff's brief, pp. 13-14); in short, "nothing approaching a stable price structure then existed"; therefore "it needs little argument to show that no competitive precedent for the differential can be found during the period of the price wars beginning in November, 1931" (plaintiff's brief, p. 30).

Leaving aside the fact that according to the plaintiff's principal witness competition and price wars always existed in the milk industry (R. 102), the record simply does not support the plaintiff's repeated assertion that the independents took the initiative in the price wars. In addition to the plaintiff's admission (at pp. 14-15 of its brief) that it made an effort to offset the advantage which the independents, we have seen, always enjoyed, the facts are that it was the plaintiff and Sheffield who dropped the deposit requirement, though the independents never did; it was they who entered upon an advertising campaign that no ethical business practice should countenance ever for a moment; it was they who were most emphatic in the recommendation that the classified price plan be made universal; and it was they who were most insistent that a ban be placed on the sale of bulk milk.

And it is not difficult to understand why all this should have been so. The plaintiff and Sheffield were in almost complete control of the retail field. Their position in the wholesale field was much less extensive, and more precarious. A shift to bottles was bound, they believed, to benefit them. The bulk of their business was bottled and they were best equipped to take advantage of any

increase. Besides, the prestige of their trade names did not loom so large in sales of loose milk. They were therefore very eager to have the ban imposed. When the ban was announced, they saw their opportunity to extend their hold and immediately set to work to do so. It is no doubt true that the banning of loose milk and the introduction of State control were merely coincidental. It remains true also that the agitation of these well-advertised dealers was conducted simultaneously on all fronts. At the same time that they were urging upon the Legislative Committee a scheme which would require the independents to pay more for milk than the blended price they themselves were paying, they were slandering their product in the public press. While they were carrying on these activities, they were adopting—purely as a measure of defense, the plaintiff would have us believe—the abolition of the bottle deposit. Truly these giants must have been sorely pestered by the little independents—the Legislature's darlings—to have been driven to such extreme measures of self-defense. Or is the word to be understood in the good old military sense that the best defense is an offense?

We think that the record establishes that it is the well-advertised dealers who are the aggressors in the conflicts which arise between them and the independents. The very institution of this suit seems to us only another operation in their offensive against their smaller competitors. It is now clear, we trust, that the enactment of the universal application of the classified price conferred an inestimable boon upon the hard-pressed well-advertised dealers. It is a fair assumption that if the choice were exigent, they would prefer the classified price plan with a differential rather than no classified plan at all—the Milk Control Law with the challenged section rather than no law at all. But the choice is not exigent; they see the possibility of having the classified price plan without the differential, the possibility of completely exterminating the enemy and securing the field to themselves. Hence this suit.

The Legislature, the testimony shows, was unwilling to approve such a maneuver. When the bill with the classified price but without the differential was before the Legislature, it proved unsatisfactory, and it clearly appeared that it could not pass unless something were done to safeguard the independent producers and dealers (R. 189). It was not until the differential was incorporated that the bill did pass (R. 189-190). Nevertheless the plaintiff insists under Point X of its brief (pp. 52-53) that the differential is not an integral part of the law.

The differential is not only an integral part of the law, but its incorporation was a condition to its enactment. And the most convincing proof which could be mustered in support of the claim that the well-advertised dealers and not their small competitors are the aggressors in this war is the fact that the former, while clinging to the great benefits the Legislature bestowed upon them, do not hesitate to resort to every available means to deprive the latter of their protection even if that involves overriding the clearly expressed intentions of their benefactors.

The plaintiff states that "nothing approaching a stable price structure then existed" (appellant's brief, p. 31). The Master has indeed found that there was "widespread price-cutting", "a steadily declining price level" and "wide variations" in prices (Findings 26, 67, R. 288). Below we show what these actually amounted to. But, giving them the most calamitous import here, it still does not mean that there was no established differential.

What price-cutting, price variations and a declining level mean is simply this, that prices kept changing because they kept steadily declining and that they varied frequently. But that, we repeat, does not exclude the existence of a more or less uniform price difference between the well-advertised and the independent milk which the Master found (Finding 66, R. 297). What happened, as we suggest above, is that when the plaintiff dispensed with the bottle deposit or reduced its price, the independ-

ents were obliged to inaugurate a compensatory drop in their price. Thus prices kept changing by declining, but the differential was maintained.

We find confirmation of this conclusion in the plaintiff's insistence that it never did go as far in reducing prices as the independent dealers (plaintiff's brief, pp. 13, 31). Indeed not; the independents could not permit it. Their entire existence depended upon the differential and they were bound to maintain it at all hazards.

We have said that the Master found wide price variations, price wars and a resulting decline in prices.

As to the "wide variations", the plaintiff's own exhibits (Plff.'s Exs. 1, 5, 5-a, R. 223) show that the plaintiff's own prices varied as widely *before* November, 1931, as after.

As to the repeated price wars, the plaintiff's own witness, Mr. G. N. Allen, the executive secretary of the Emergency Committee bearing his name, testified that during the four-month period beginning September, 1932, when conditions were supposed to have been most "chaotic", and during which time he and his associates made a thorough survey of the situation, only 10 of the 86 New York City dealers with whom the committee was in contact were engaged in price cutting (R. 153; Defts.' Ex. 12).*

As to the "resulting" reduction of prices from 13¢ to 6¢ or less, there is no warrant for concluding that these so-called price wars were alone responsible for the decline. The chief cause of the decline of all prices in this worst period of the world's worst depression was the unprecedented shrinkage of purchasing power (see Finding 5, R. 283).

Moreover, it is inaccurate to measure the price fall by (except for inconsequential sales) the highest price in November, 1931, and the lowest in March, 1933 (again

* Another of the plaintiff's witnesses, the superintendent of one of its branches, stated that in his district there was no price-cutting at all during this period (R. 266).

the same exception). Measured by the lowest in November, 1931, and the highest in March, 1933, the decline would be much smaller.

Finally, in *1932*, when according to the plaintiff things were most "chaotic", the plaintiff's total sales of bottled and bulk milk to stores were greater than even in *1929* (Finding 65, R. 297). Apparently this was the kind of "chaos" upon which the plaintiff thrived.

In support of its contention that no competitive precedent for the differential can be found in the period between November, 1931, and the introduction of milk control in April, 1933, the plaintiff points to Finding 32 (R. 289) that the dropping of the bottle deposit requirement by the plaintiff and Sheffield in July, 1931, was equivalent to a drop of approximately two cents in the price of their milk. The plaintiff makes this finding the basis for its argument that between July, 1931, and the fall of 1932, when a three-cent deposit requirement was restored, its prices were as low as the prices of those independents who had thereupon widened the differential from one cent to two cents (Finding 68, R. 298) and "actually lower" than the prices of the more conservative independents who allowed the differential to remain at one cent (plaintiff's brief, p. 31).

Passing without further comment the fact that when the plaintiff (ever so reluctantly, no doubt) abandoned the deposit requirement, it upset one of the most inveterate practices in the milk business (Pitcher Report, p. 257) and accepting for the moment the calculation that the cost of this measure to the plaintiff was approximately two cents and not, as we shall show, considerably less, the conclusion that the dropping of the deposit meant a drop in price seems to us open to question.

The dropping of the deposit requirement undoubtedly meant an increase in distributor's costs to the plaintiff; "whereas the number of trips per bottle with a deposit charge averaged over twenty, after the deposit charge was

removed, the average dropped to around four trips" (Pitcher Report, p. 257). But this increase in cost to the plaintiff did not mean that the consumer purchased the plaintiff's milk for less than he had been accustomed to pay; the consumer continued to pay for the plaintiff's milk as much as he had paid before the deposit requirement was abandoned. It is true that he was spared the necessity of making the deposit and the inconvenience of returning the bottle in order to have the deposit refunded, and no doubt this dispensation played a part in the calculations of some consumers. But to the habitual store purchaser, accustomed to the deposit practice which the Pitcher Report found had been almost universal (p. 257) and intent upon the saving that buying independent milk yielded, the independents' further reduction of their price, consequent upon the plaintiff's dropping of the deposit requirement, meant not a lowering of the plaintiff's price to the level of the independents, not a disappearance of the differential, but a widening thereof, a possibility for further saving and an additional inducement for the purchase of independent milk.

We have said that the dropping of the deposit requirement meant an increase in cost of considerably less than the two cents fixed in Finding 32. After the deposit requirement was abandoned, we have seen, the number of trips per bottle dropped from an average of twenty to an average of four (Pitcher Report, p. 257). Since it is conceded that a bottle costs no more than five cents, this means that whereas the bottle cost per trip before the deposit requirement was abandoned was one-quarter cent (5¢ ÷ 20 trips), the cost thereafter was one and one-quarter cents (5¢ ÷ 4 trips). The Pitcher Report (p. 257) therefore concludes that "this meant an added cost of nearly one cent per quart in the cost of distributing milk through stores"—an added cost of nearly one cent to the plaintiff and not a decline of approximately two cents in price to the consumer.

The only proof which the plaintiff cited in support of Finding 32 was an isolated remark by one of the independ-

ent dealers that dropping the deposit requirement "had the same effect as if they dropped the price of milk around 2¢ a quart, close to it" (R. 214). In the first place, it is obvious that this dealer was merely expressing an individual, highly speculative opinion; "6½¢", he said, "might be a higher price than 8¢ for milk when you charge a 5¢ deposit" (R. 112). In the second place, he was uncertain as to its effect even in his own business—"whether it brought us 8 or 9 or it brought us in that period 6½¢" (R. 114). This, it seems to us, is an exiguous base upon which to rest a finding that contradicts not only all the known facts, but also the expert conclusions of the Pitcher Report.

Our analysis of the plaintiff's argument has established, we think, that a "competitive precedent" for the differential provision existed both before and after November, 1931, that, in other words, the differential the Master found was a true differential and not the formless, chaos-enshrouded configuration the plaintiff has striven to depict. For the reasons stated, we think that this differential alone justifies the affirmance of the decree.

B. The Master stated that the differential provision "has no relation to any of the objects or purposes for which said law was enacted" (Conclusion of Law 2, R. 298). The plaintiff in the heading of Point II (p. 29) states that it is directly at variance with them. We think that this Court will experience no difficulty in discovering a harmony between them.

The Legislature, we have seen, was told that the adoption of the law without the differential "would mean a loss of outlet to their [independent] producers" (Finding 40, R. 290-291) and that "their [independent] farmers would lose their outlet" (Finding 44, R. 291-292). There is nothing illegitimate, we take it, in attempting to prevent such a consummation. Here then, it would seem, is at least one purpose which the Legislature might strive to serve. The Master, however, stated in his memorandum

(R. 305) that "the voluminous proofs fail to furnish facts on which to base a finding as to the effect of minimum prices without a differential." The Court below disagreed with the Master and made findings (71, 72, R. 320-321) tending to show that the elimination of the differential would eliminate the independent dealers and in that way seriously affect the independent producers. To us the soundness of these findings seems beyond question.

In the first place, the effect of minimum prices without a differential is self-evident. Who, except for possible sentimental reasons, as one* of the plaintiff's witnesses no doubt jocosely suggested (R. 93), would prefer to buy "Cato" milk rather than "Borden's" or "Sheffield's" unless something were to be saved by it? The fact that "the people in New York City who come to stores to purchase their bottled milk are, generally speaking, from the classes having the lowest income" (Finding 49, R. 293) is proof enough that so far as the independents are concerned their only chance of survival lies in their ability to continue their price appeal. In the second place, there is ample proof in the record to show what effect minimum prices without a differential would have. Numerous witnesses, grocers and dealers, testified that when they attempted to get the same price for independent, unadvertised milk they were unsuccessful. One dealer lost in a short time "approximately 30 to 35%" of his business in the attempt (R. 115); another "in a period of a couple of weeks * * * lost 20 to 30%" of his business (R. 120-121). Many grocers testified that they tried to get the same price but failed and that if they repeated their attempts they would fail again. Since the matter is covered in the preliminary statement, we will refrain from giving any further details of their testimony here.

It seems to us clear, therefore, that the interest of the independent farmer is intimately tied up with the in-

* Another one of the plaintiff's witnesses, when pressed for a reason, stated: "I don't know why the customer would buy bottled milk of the unadvertised brands at that time at the same price as Borden's. It is kind of hard to answer it; I would not know how to answer it" (R. 206).

terest of the independent dealer. And since it is admitted that "the chief purpose of the Milk Control Legislation was to improve the economic condition of the farmer-producer" (Master's memorandum, R. 304), it follows that the differential, insofar as it assures the independent farmer the same outlet for his milk that he had before, functions in that direction.

The differential has a tendency to improve the economic condition of the farmer in another respect. The finding is that "since the enactment of the 1933 Law the independent dealers have continued to sell for fluid consumption a proportionately larger share of the milk purchased by them than the well-advertised dealers" (Finding 47, R. 293). That means that now, since the universal application of the classified price, the independent farmer gets a substantially higher average price for his milk than the co-operative farmer, whereas before he got only the same price as the Sheffield farmer and a slightly higher price than the League farmer. While it is true that by fixing minima considerably higher than those prevailing before control the conditions of all farmers have been improved, this is especially true of the independent farmers because they have benefited most.*

---

* In 1934 the prices paid by Ferndale, one of the larger independents, to its producers for 100 pounds of milk compares as follows with the prices received by the League producers (R. 220):

| | Ferndale | League |
|---|---|---|
| January | $1.69½ | $1.44 |
| February | 1.70 for part of month, 1.65 for balance | 1.43 |
| March | 1.46 | 1.35 |
| April | 1.50½ | 1.30 |
| May | 1.50 | 1.28 |
| June | 1.58½ | 1.33 |
| July | 1.63 | 1.42 |
| August | 1.72 | 1.51 |
| September | 1.77 | 1.40 |
| October | 1.76½ | 1.44 |
| November | 1.93 | 1.64 |
| December | 1.96 | 1.69 |

From these amounts the League deducted 7 cents per 100 pounds for a certificate of indebtedness. Ferndale carries more surplus than most of the smaller independents (R. 220); consequently it is fair to conclude that the prices paid by the smaller independents were even higher than those paid by Ferndale.

We have said that the Legislature might legitimately strive to prevent the threatened loss of the independent farmer's market. Undoubtedly the test of the propriety of the purpose will depend not only upon the objective but also the means employed. We will consider below whether the Legislature might not have sought to accomplish its aim by creating a differential even if the finding of its pre-existence were less firmly grounded than it is or even if none had previously existed. For the present we wish merely to emphasize the fact that the Legislature had no need to go beyond incorporating into the statute that which already existed.

We are therefore, though for different reasons, in entire accord with the plaintiff that the present statute is manifestly different from those considered by this Court in the chain-store tax cases (*Tax Commissioners* v. *Jackson, supra; Ligett* v. *Lee,* 288 U. S. 517; *Fox* v. *Standard Oil Co.,* 294 U. S. 87). The purpose of those statutes was to foster equal opportunities by imposing newly created burdens upon those who had outstripped their competitors in the race. The purpose of the present statute is to foster equal opportunities by merely maintaining advantages which always existed.

In this setting the plaintiff's plea that the doctrine of those cases should not be extended to the present case (plaintiff's brief, p. 48) has a paradoxical ring. Upholding the present statute will not involve an extension of the doctrine of those cases; the truth is that this Court in the chain-store tax cases has gone much further than it needs to go in order to uphold the present statute.

C. We have, we believe, sufficiently elaborated the point that the differential does, so to speak, keep the relationship between the dealers in *status quo* and insures that when price control is abandoned there will still be the same competition that existed before. The result of the differential is therefore to check the tendency to monopoly which minimum prices without a differential would undoubtedly stimulate.

It follows that if it was the aim of the Legislature to prevent monopoly, the differential in this respect also is related to the objects and purposes of the law. The question therefore is, Did the Legislature enact the differential provision as a precaution against monopoly?

An examination of the provisions of the Act alone will not disclose such a purpose and this Court, when the case was here the first time, turning to the provisions of the Act for a criterion, naturally found no evidence of such a purpose there (pp. 205, 206). An examination of the findings will, however, supply any lack in the statute itself. The Legislature was told that if price control without a differential were adopted, it "would tend to create a monopoly which would eventually raise prices to consumers" (Findings 41, 44, R. 291, 292). Presumably the Legislature accepted and acted upon these representations. It believed that the danger of monopoly existed and that the differential provision is reasonably suited to averting it. The Courts will not lightly disturb the legislative determination upon either question.

---

What the Legislature did here, we have seen, has been merely to continue a condition which previously existed. Though it is unnecessary to a decision of this case, it will prove fruitful to consider whether the Legislature did not have the power to incorporate in the Law a differential even if one had not previously existed.

In *Fox* v. *Standard Oil Co.* (*supra*) this Court recognized the State's power to discourage bigness by favoring the small enterprise at the expense of the larger ones. Discussing the West Virginia graduated chain-store tax statute, it said:

> "Not only may it do this [tax the large chains more heavily than the small ones, and upon a graduated basis], but it may make the tax so heavy as to discourage multiplication of the units to an extent believed to be inordinate, and by the incidence of the burden develop other forms of industry."

It is true that this was said in relation to chain stores. But the findings show that the plaintiff and Sheffield Farms Company, the two well-advertised dealers whose structure and organization are discussed, are in effect chains. Each is as much "a distinctive business species, with its own capacities and functions," as any chain, and the greater each becomes "the more far-reaching are the consequences, both social and economic," bound to become. Each enjoys at least a few of the chief benefits of such organizations: "abundant capital; standardization of equipment and display; superior management; more rapid turnover; special accounting methods; and a unified sales policy co-ordinating the diverse units." And to us there appears no reason why a power applicable to chain stores should not be applicable to organizations like the plaintiff and Sheffield Farms Company.

It is also true that this Court was considering a taxing statute and not one fixing prices. So far as concerns the question of power, it is, however, difficult for us to see why it should be more limited in one case than the other. If the State may discourage bigness by employing its power to tax, why may it not do so by employing its power to fix prices? Each (in the situation we are now considering) involves an imposition of a newly created burden, and since it lies as much within the State's competence to fix prices as to raise revenue, there would seem to be no basis for any distinction in the purposes for which the power might be employed.

The plaintiff makes the point that the effect of differential price-fixing is very different from that of differential taxation and on that ground insists that there is a distinction in the purposes for which they might be employed (plaintiff's brief, p. 47). It disagrees with the lower Court's observation in its first opinion that "the burden of an unequal tax is as effective a handicap in marketing the taxpayer's product as a duty to charge a fixed price". While it is true, it argues, that a taxpayer might be compelled to increase his price under the burden

of the unequal tax, that would be true only of those taxpayers who are unable to pay their taxes out of the profits which they already have; all others would have actual and effective options. On the other hand, under the compulsion of a fixed price the taxpayer has no option at all.

A realistic appraisal of the background of chain-store taxation reveals the invalidity of this argument. The avowed purpose of the chain tax statutes is to increase costs to the large units and thereby prevent them from underselling their small competitors. If that result does not follow it is only because the extra tax burden is not heavy enough. But there is nothing to prevent the States from increasing the burden sufficiently to achieve that result. When that is done the option the plaintiff speaks of will disappear.

The possible difference in effect which the plaintiff stresses arises then from the mere circumstance that the burden under the tax statutes may be insufficiently heavy and not from any distinction in principle between the two kinds of statutes.

We have said that a determination of the question whether the Legislature had the power to enact a provision for a differential even if one did not previously exist is unnecessary to a decision in this case. This is so because in this case a differential did in fact previously exist. For the same reason it is unnecessary to a decision in this case to determine the question whether the Legislature's powers were so limited that it could only enact the differential provision if its belief in its preexistence was so firmly grounded in facts that they would support a finding to that effect made in a court of law. Since, however, the Court below considered that question, we shall advert to it briefly.

The Court below, while approving the Master's finding that a differential did exist and stating that it thought the finding to be true (R. 315), nevertheless was of the

opinion that it was not necessary for the defendants to convince the Master or the Courts of the truth of its existence in order to justify the legislative action; it thought that all that was necessary for that purpose was to show "that reasonable people might have taken the view of the legislature", irrespective of whether it was demonstrably true or not. The reasoning of the Court below on this point seems to us irrefragable. We quote it at length:

> "* * * The question comes up for the first time whether when the court has undertaken an inquiry as to the facts on which the validity of a statute turns, the result is dependent upon its decision in the same sense as the result of an ordinary suit. If it finds to its own satisfaction that the necessary facts do not exist, is the law invalid? Or must it go further, as in the case of the choice of values, and find not only that the facts did not exist, but that reasonable people could not believe that they did? The question has an especial importance, because the Supreme Court has announced in this very case that the procedure here adopted ought to be generally followed. It seems to us that there can be no doubt that the second is the only tolerable doctrine. Otherwise the legislature's power would in effect be merely to enact general hypothetical propositions, which would become imperative only in case courts concluded that the facts on which their applicability depended actually existed. That is certainly not the traditional limit of a legislature's powers; frequently it institutes elaborate inquiry to learn the truth, just as it did in this case. The inquiry and its result are a part of its function, as exempt from judicial review as its social choices. If it has proceeded by commission or the like, the result may be more impressive, but it need not so proceed, and courts are as much bound in the one case as in the other. Therefore it is not necessary for the defendants to demonstrate the truth of the finding as to the differential or of the other findings, though incidentally we think that they are true. The relevant inquiry as to each is not what the master or we, or even the Supreme

> Court, may think the truth to have been, but whether reasonable people might have taken the view of the legislature" (R. 314-315).

In the present case, whatever may be said against the finding that a differential did in fact exist (in the sense that its existence could be established by proof necessary in a court of law), there can now be no doubt that the Legislature had reasonable ground for believing in its existence. This Court, when the case was last here, did not reject the test which the Court below suggested; indeed, in the state of record as it then existed, the test could not even be validly applied. Now that it appears that the Legislature had reasonable ground for believing the facts represented and the warnings addressed to it, now that it appears, that is, that the Legislature's action is not indefensible, the test becomes applicable, and, if sound, requires an affirmance without regard to the question whether a differential did or did not in fact exist.

## POINT II.

**The plaintiff has not shown such damage traceable to the differential as entitles it to relief in equity.**

Whether the plaintiff has suffered any actual loss of business that can be traced to the differential is one of the issues most keenly contested in this case. The Court below was justified in saying that the evidence of injury to the plaintiff is not clear (R. 317). The plaintiff's proof failed to sustain its complaint as to this matter, and departed widely from it.

In the original bill of complaint and the supporting affidavit there appeared the following allegations:

> "By reason of the said Articles and the said Official Orders the plaintiff's market for the sale to stores in the City of New York of its fluid milk in bottles under its trade name 'Bordens' is and will be impaired to the extent of at least 25,000 quarts

daily. The plaintiff is now suffering, and will suffer each day that the said impairment continues, immediate and irreparable injury, loss and damage for which it has and can have no redress" (Complaint, par. 33, R. 14).*

"Deponent is informed and verily believes that by reason of the one cent price differential in favor of dealers not classified as having well advertised trade names, the sale of the plaintiff's bottled milk to stores has been impaired to the extent of at least 25,000 quarts daily. * * * Deponent is informed and verily believes that * * * house to house delivery business has been impaired to the extent of at least 50,000 quarts daily" (Affidavit of John F. Watson, R. 80-81, earlier record).

Other allegations in the same affidavit indicated that the figures alleged an actual net loss up to May 3, 1934, of 12½ percent on each class of the plaintiff's business, measured during the 13 months the law had been in effect, and due entirely to the differential. Upon the earlier argument those allegations were accepted as true, and as establishing a case of "immediate and irreparable injury." It is now apparent that the allegations were overdrawn, both as to the facts alleged and as to the prophecies made.

The proof now presented is that during the week of April 6, 1933, the plaintiff sold 999,955 bottled quarts of Grade "B" milk to New York City stores, and during the week of May 10, 1934, it sold 1,279,387 quarts (Finding 57, R. 295). Those figures are open to explanation, to be dealt with hereinafter; for the present the only point made is that the proof of damage cannot possibly support the original allegation. Moreover, the plaintiff's house-to-house delivery business did not suffer appreciably even from the general decline of milk consumption (Findings 53, 54, R. 294).

* The reference is to the earlier record before this Court, No. 296, October Term, 1934. The same allegation appears in the amended complaint, paragraph 46 (R. 16).

The fact is that the plaintiff's business as a whole shows no sign of being impaired from any cause except the general decline in milk consumption. Its constancy is the striking feature, presented by Finding 52 (R. 294):

> "Plaintiff's total sales of milk (retail, wholesale and relief) in the Metropolitan Market in November, 1934, were 4.9% less than its sales in November, 1932. Total receipts of milk in the Metropolitan Market were 4.6% less in November, 1934, than in November, 1932. Plaintiff's total sales of milk (retail, wholesale and relief) in the Metropolitan Market in November, 1934, were 1.6% greater than its sales in November, 1933. Total receipts in the Metropolitan Market were 1.9% less in November, 1934, than in November, 1933."

The defendants concede that the plaintiff would gain business from the unadvertised dealers if the differential were abolished, but obviously the plaintiff cannot rest its proof of damage upon that concession because it denies that there is any danger of its acquiring a monopoly. The plaintiff can make out its case with nothing except actual net loss of business, clearly due to the differential. The plaintiff infers those conclusions from certain findings made by the Master, but the inferences and some of the findings from which they are drawn alike are in dispute.

The plaintiff argues the matter as follows in its present brief (p. 18):

> "In the week of June 8, 1933, which was the first full week after the ban on bulk milk, the daily average of the appellant's sales of Grade 'B' bulk and bottled milk to stores in New York City dropped 21,054 quarts below its daily average during the week ending May 25, 1933, the last full week before the effective date of such ban (R. 297, Finding 62). * * * For the week ending November 8, 1934, the appellant's daily average sales of bottled milk to stores in New York City were 42,000 quarts below its daily average for the week ending June 8, 1933 (R. 297, Finding 63)."

The defendants take no exception to Findings 62 and 63, but they decline to follow the plaintiff in the inference that its differences in business measured by those findings are losses of business due to the differential. Several other things happened between the spring of 1933 and the fall of 1934 besides the differential, and some of them had just as probable a relation to the plaintiff's decrease in store milk business, whether bottled business alone or bottled and bulk business together. A notable example is that the sale of bulk milk to stores for resale to consumers was abolished on June 1, 1933; the fact that the plaintiff's combined bulk and bottled business declined at that period needs no other explanation. The plaintiff cannot justify its inference until it segregates the effects of those other factors, or at least shows that the advertised dealers lost store bottled milk business more than did the unadvertised dealers. Some of the factors other than the differential which singly or cumulatively would explain the plaintiff's apparent loss of certain classes of business described in Findings 62 and 63 are the following:

(a) *Seasonal variation.* According to Findings 57 (R. 295) and 63 the plaintiff's sales of bottled Grade "B" milk to New York City stores fell from 1,367,566 quarts in the week of June 8, 1933, to 1,073,348 quarts in the week of November 8, 1934, an apparent loss of 42,000 quarts per day, or about 21 percent loss. However, that figure becomes meaningless when considered in connection with Finding 64 (R. 297). Milk consumption always is low in November compared with the rest of the year, and the drop is entirely in store milk business; indeed, retail or house-to-house milk business is high in November. It can be deduced from Finding 64 that store milk business, considered by itself, is about 30 percent lower in November than in the rest of the year,* so the 21 percent drop in the plaintiff's

* The plaintiff's business is about two-thirds retail and one-third wholesale (Finding 54, R. 294). Milk business as a whole is about half retail and half wholesale (Finding 16, R. 285). Milk business as a whole is two

store business from June, 1933, to November, 1934, has no tendency to prove any but a seasonal loss of business.

(b) *Decreased consumption.* Milk consumption for each month of 1934 was substantially lower than for the corresponding months of 1933 (Finding 51 and Table, R. 293, 299-300). Obviously Findings 62 and 63 should be considered in the light of that general decline in milk sales. The plaintiff's brief concedes this (p. 20), but insists upon assuming that the decline in milk sales affected all classes of milk business in equal proportions. On the contrary, there is reason to believe that the entire decline was in wholesale business. Certainly there was no corresponding dcline in the plaintiff's retail milk business, whether in Grade "A" (Finding 60, R. 296), in Grade "B" considering the whole Metropolitan market (Finding 54, R. 294), or even in Grade "B" considering New York City alone (Finding 53, R. 294). Moreover, three factors in decreased sales of milk were peculiarly applicable to store and restaurant business:

(1) *Sales of relief milk.* During the last six months of 1934, the plaintiff acquired a new outlet for milk through public relief stations. That business was done under conditions which tended to compete with its store business (see Finding 59, R. 296), but was excluded from store business for the comparison between June, 1933, and November, 1934, in Finding 63 (Finding 59, last sentence, R. 296). By November, 1934, the plaintiff's public relief milk sales were averaging 24,868 quarts per day, and with its school

---

to three percent low in November, but the plaintiff's business, because of its greater percentage of retail business, is two to three percent high in November (Finding 64, R. 297). If the extra one-sixth of wholesale business served by dealers generally makes their business five percent lower in November than the plaintiff's business, wholesale business by itself must be 30 percent lower in November than in the year generally. Implicit faith in this exact percentage is not recommended, but at least the seasonal variation as to wholesale business between June and November is real and substantial, and the percentage is a mathematical deduction from some testimony given on behalf of the plaintiff, as to the peculiarities of its business (R. 213, 217-218).

relief sales accounted for nearly all of its "loss" of wholesale business since the preceding November (Finding 58, R. 295-296). Because relief milk was a large factor in the plaintiff's 1934 sales, tending to supplant its wholesale sales but excluded by the Master from his comparisons (Finding 59, last sentence, R. 296), the "loss" of wholesale business ascribed to the plaintiff is apparent or theoretical rather than real. It is impossible to restrict the distribution of a cheaper milk supply or a free milk supply so that it will not tend, to some extent, to compete with ordinary sales. The plaintiff's principal witness conceded that it is probably true that sales of relief milk at 8 cents a quart have some tendency to compete with sales in nearby stores at 11 and 12 cents a quart (R. 217), and the opinion below makes a similar observation (R. 318).

(2) *Abolition of loose milk.* This step, effective on June 1, 1933, deprived the poorer people in New York City of a cheap food supply. This statement is not intended as a criticism of the step, but merely as a recognition of one very important aspect of it. Decreased consumption in 1933 and 1934 was primarily an expression of decreased purchasing power, and perhaps to some extent a protest against the price increase in milk brought about under the Milk Control Law. Either expression would affect store milk business primarily. The plaintiff should not be surprised that its increase in bottled milk sales to New York City stores, after the abolition of loose milk, was far below the loose milk business which was lost. That is the true explanation of Finding 62 (R. 297), so much relied upon by the plaintiff in its brief (p. 21). Abolition of loose milk, and legalization of beer, explain the difference between November, 1932, and November, 1934, relied upon at page 21. Those factors were peculiarly applicable to store and restaurant busi-

ness, and caused it to suffer the entire decline in consumption, rather than merely the equal proportion of decline assumed by the plaintiff's brief.

(3) *Sales of beer.* Beer became a lawful beverage in New York State on April 1, 1933, and was sold generally in restaurants, hotels and stores. New York City newspapers of March, 1935, carried a statement from the Brewers Board of Trade that in 1934 inhabitants of the City consumed 53 gallons of milk per capita, 22 gallons of beer and 20 gallons of coffee. The effect of beer consumption upon milk consumption, particularly sales of milk from hotels, restaurants and stores, is obvious, even if somewhat difficult to measure. One of the notable changes in the milk business in New York City, partly as a result of abolishing loose milk and partly as a result of legalizing beer, has been a flattening out of the midsummer peak in wholesale milk business.

Thus far, it is apparent that the plaintiff has failed to prove its case by the method of showing a loss of business and eliminating factors other than the differential which may have caused it. At page 21 of the plaintiff's brief it is conceded that the demonstration by that method is incomplete. So far as concerns that method, the plaintiff's failure is rather striking, because the other factors offer the more probable explanation of the "loss" shown. Accordingly, considerable importance attaches to testing the other possible method of proof on behalf of the plaintiff, along the line that advertised dealers lost a greater percentage of store bottled milk business than did the unadvertised dealers.

Upon this line the plaintiff was successful in obtaining Finding 23 (R. 287):

> "Since the enactment of the 1933 Law, the advertised dealers have had a smaller proportion relative to the independent dealers of the total sales

of bottled milk to stores in New York City than before the enactment of said law."

The position of the defendants is that the finding, although it may be true in a literal sense, is subtly worded to convey an inference which has no substantial support in the evidence and is opposed to the weight of it. This much is true, that the abolition of bulk milk became effective less than two months after the enactment of the 1933 Law, and at about that time there was some tendency for grocers and others who had been buying milk from unadvertised dealers to change to bottled milk supplied by the same dealers. The unadvertised dealers had more of the bulk milk business (compare Findings 16 and 33, R. 285, 289), and so they may have obtained more of the new bottle business during the conversion. That this tendency was owing to the differential, and continued evenly during 1933 and 1934 after its enactment, is the unproven inference which is written into Finding 23 by appealing to the "post hoc propter hoc" association of ideas.

The only support in the evidence which the plaintiff ever has cited for Finding 23 is the limited observation of a few storekeepers. They were called as witnesses for the defendants, primarily upon the issue that there was a differential between advertised and unadvertised brands of milk by custom before the 1933 Milk Control Law was enacted. Incidentally, without any importance being attached to it at the time, four of them made remarks which subsequently were cited by the plaintiff as the sole support for an important finding.

Mr. Herman Levine, manager of the United Grocers and Dairymen's Association, having 350 members, at one point in his testimony was asked in what proportion the members carry advertised and unadvertised brands, and said:

"The storekeepers whom I represent now carry advertised and unadvertised brands. They carry in a smaller proportion the advertised brands, in a

larger proportion the unadvertised in our stores, and the reason you know" (R. 143).

The plaintiff cited this testimony to the Master in support of the finding, notwithstanding that it is ambiguous, and the subsequent testimony of the same witness showed that he meant that the advertised brands *always* had a smaller sale in the stores than the unadvertised brands (R. 144).

Mr. Isaac Mandell, a grocer, testified that in 1930 and 1931 he was selling from 12 to 18 quarts daily of Borden's milk, and about 6 to 8 quarts of bottled milk of an unadvertised brand (R. 162); he also sold an unadvertised brand of bulk milk (R. 161). At the time of the trial he was selling only 4 to 6 bottles daily of Borden's milk, and about 150 bottles of an unadvertised brand (R. 161). This testimony also was cited by the plaintiff in support of Finding 23, but it does not seem to be very significant. Borden's did not lose any appreciable amount of business in Mr. Mandell's store; it merely failed to gain the new bottled business when the bulk milk business was abolished.

Mr. Sol Katz, a grocer and officer of a grocers' association, testified that before April, 1933, he sold 120 quarts daily of an unadvertised brand of bulk milk, 12 quarts of the same unadvertised bottled milk, and from 24 to 36 quarts of advertised bottled milk (R. 163). In early 1935 he sold 84 quarts of the same unadvertised bottled milk and 14 quarts of advertised bottled milk (R. 164). He said that the proportion of advertised and unadvertised did not change much during 1933 and 1934 (R. 164).

Mr. Max Title, another grocer, said that in 1929 and 1930 he used to sell about 24 quarts daily of advertised bottled milk, about 12 quarts of unadvertised bottled milk, and upwards of 120 quarts of the same unadvertised bulk milk. In early 1935 he was selling about 120 quarts of the same unadvertised bottled milk and about 36 quarts of advertised bottled milk (R. 165).

It could be expected that the witnesses produced by the defendants would reveal some preference for unadvertised milk, probably derived from or reflected in their business, but the testimony just summarized, even if it is assumed to be representative, affords a very weak foundation, and the only foundation ever referred to, for the important trade generality expressed in Finding 23. The only evidence of a general nature upon that issue also was supplied by the defendants' witnesses, and tends to disprove Finding 23. That evidence is as follows:

(a) In October, 1933, the four advertised dealers had 32.6 percent of the wholesale milk routes in New York City (Finding 20, R. 286). In November, 1934, they were selling at least 35 percent of the bottled milk to stores (Finding 22, R. 287). The plaintiff's brief denies that there is a necessary relation between number of routes operated and amount of milk sold (p. 19). There is testimony to the contrary (R. 169), and the zeal of milk executives for maintaining a high average load per route is well known.

(b) Some unadvertised dealers, and a majority of those in a list selected to be representative, have lost 20 percent or more of their sales to stores since enactment of the 1933 Law (R. 171, 174-176, 90, 110, 242).

Somewhat related to Finding 23 is Finding 17 (R. 285), to the effect that there has been a continuous trend since 1930 from retail sales of bottled milk to sales of bottled milk through stores. Undoubtedly the conclusion of the Pitcher Report, at page 163, that from 1930 to the abolition of bulk milk in 1933 there was an increase in the proportion of milk sold in bottles through stores, is correct; but there is good reason to suppose that store sales of bottled milk have not continued to gain since June, 1933, and on the contrary have suffered the entire decline in milk consumption experienced since that time. (See, upon that topic, the argument of this brief, commencing with the title "decreased consumption", *supra*, p. 52 *et seq.*)

The looseness of method, and uncertainty of data, underlying Finding 17, that there has been a constant trend from retail to wholesale selling, and Finding 23, that the advertised dealers have not retained their share of the wholesale business, is indicated by the first sentence of Finding 22 (R. 287), which does not attempt to tell closer than a range of 10 percent how much wholesale milk business there was in New York City in November, 1934.* The known factors were that 3,430,460 quarts of milk daily were received in the entire Metropolitan Market during that month (Finding 51, and Table, R. 293-294), of which 360,391 Grade "B" quarts were being sold in bottles to New York City stores by the advertised dealers.** All the rest leading up to Findings 17, 22 and 23 is no better than guesswork.

The plaintiff's brief (p. 19) criticizes the opinion below for drawing from Findings 20 and 22 a conclusion said to be inconsistent with Finding 23. The defendants submit that Finding 23 rests upon a weak foundation, and in any case is too vaguely phrased to say anything about sales in 1934.

It is respectfully submitted that the foregoing amply justifies the statement that one of the issues most keenly

---

* The 1,000,000 figure used in Finding 22 is from a computation by Mr. Eastlack, the plaintiff's statistician, using 39 percent of 80 percent of 3,430,480 (R. 100). The 900,000 figure is 39 percent of 68 percent of the same base figure. There is no issue about the 39 percent, although its accuracy is not otherwise established. The issue is whether New York City consumes 80 percent or 68 percent of the milk consumed in the metropolitan market. The defendants support their preference for 68 percent by the following arguments:

(a) The population of New York City is about 69 percent of the entire metropolitan market, according to the 1930 census.

(b) In October, 1933, milk sales in New York City were 2,437,795 quarts per day (Finding 20, R. 286), which was 67.9 percent of total receipts for that month in the metropolitan market (see Finding 51, and Table, R. 293-294). Mr. Eastlack's computation finds that milk sales in New York City were larger in November, 1934, than the known figure for October, 1933, notwithstanding a considerable decrease in consumption according to figures for the metropolitan market as a whole.

** In November, 1934, Renken was selling 25,137 quarts per day, Sheffield 173,614, the League 5,234 (under the trade name of "Dairylea", R. 107), and Borden's (excluding small bottles and relief milk) 156,417 (Finding 58, R. 295-296).

contested in this case is whether the plaintiff has suffered any actual loss of business that can be traced to the differential. The plaintiff has not sustained the burden of proof upon that issue and has not shown such damage traceable to the differential as entitles it to relief in equity.

## POINT III.

**The plaintiff is estopped from attacking the constitutionality of the differential provision.**

On May 10, 1933, the plaintiff made an application for a license under the 1933 Act and in its application agreed to comply with and obey the provisions of the Act. On August 15, 1933, a license was issued to the plaintiff (Finding 50, R. 293). By obtaining a license under the Act, it acquired a valuable property right, a right which prevented all unlicensed persons from competing with it in its business (*Frost* v. *Corporation Commission,* 278 U. S. 515). For an entire year it availed itself of the benefits of the Act, particularly the great benefit of the universal application of the classified price which deprived the independent dealers of the advantage theretofore enjoyed by them in being able to buy all their milk at the blended price. Its virtual joint control with the Sheffield Company of the retail milk business was undisturbed. No differential was imposed with respect to the sale of cream to stores with all the advertising advantages in favor of the plaintiff. These rights and benefits it enjoyed only by virtue of the Act and its agreement to obey all parts of it. The plaintiff is now estopped from attacking that part which it regards as a burden (*United Fuel Gas Co.* v. *Railroad Commission,* 278 U. S. 300; *Booth Fisheries* v. *Industrial Commission,* 271 U. S. 208; *St. Louis Co.* v. *Prendergast,* 260 U. S. 469).

The plaintiff argued in the Court below that these cases have no application in the present instance because

the law which the plaintiff is now attacking is the 1934 and not the 1933 Law and that the plaintiff cannot be deemed to have estopped itself from attacking the 1934 Law by taking the benefits of the one enacted in 1933.

This argument cannot rest on any theory that the 1934 Law is essentially different from and not in reality merely a continuation of the 1933 Law. The second paragraph of the introductory statement of the findings states that "the 1934 Law (Ch. 126 of N. Y. Laws of 1934) re-enacted substantially the same provisions" contained in the 1933 Law (R. 281). The plaintiff in its brief to this Court on the first appeal (p. 4) stated that the two laws are "fundamentally similar statutes for the control of the production and marketing of milk in New York State." * And this and the Court below in their respective opinions indicated that they also took that view. Here we have an acknowledgment that, except for rearrangement and changes which are inconsequential in themselves and of no possible moment to the present litigation, the 1934 Law is merely a continuation of the 1933 Law.

So much for the law viewed as a whole. Coming to the portion attacked, we have not only the acknowledgment (again in the introductory statement) that Section 258-q (the differential provision in the 1934 Act) "is substantially a re-enactment of Section 316-c" (the differential provision in the 1933 Act), but we find that even the same language is employed.

The theory upon which the plaintiff's argument apparently did rest is that the plaintiff's application for a license and acceptance of the benefits under the 1933 Law "did not import any willingness on its part to give up any rights under further legislation on the same subject whether amending, continuing or radically altering that statute" (R. 306).

This contention ignores the vital difference between a mere extension of a statute and its radical alteration or

* In its present brief the plaintiff states that the 1933 Law "was in its broad aspects similar to the 1934 Law" (p. 2).

amendment. Suppose that instead of "substantially re-enacting" the 1933 Law in 1934, the Legislature had originally provided that the 1933 Law should remain in force for two years and had in 1934 rearranged and amended the 1933 Law into the form in which the 1934 Law is found. We do not doubt that it would be conceded that in such a case the plaintiff would be estopped from attacking the law in the second year of its existence even though it took the benefits under it only during its first. Why should the result be different because the Legislature adopted a different method?

Again, suppose, as the plaintiff insists is the fact, that the differential had not yet crystallized into an established practice at the time of the enactment of the 1933 Law. That means that, as the plaintiff admits (par. 22 of the amended complaint, R. 7), the differential which concededly existed at the time of the enactment of the 1934 Act became an established practice during the period of the plaintiff's acquiescence. That it would be dangerous to unsettle this practice—dangerous in the sense that if the differential is eliminated it would put the independents out of business, deprive their farmers of a market, cause strikes and riots and ultimately threaten the supply to the consumer—seems to us beyond dispute. Yet, if the plaintiff is to be allowed to attack the differential provision in the 1934 Law—the provision which its acquiescence in the similar provision in the 1933 Law made necessary—it means that it is in fact not to be obliged to accept the consequences of its own conduct—an immunity which it has not shown itself entitled to.

We think that once having agreed to be governed by certain regulations the plaintiff cannot so easily rid itself of the obligation to abide by them. This is utterly different from saying that it must also abide by any *other* regulations which the Legislature may impose. Such, as we see it, is the distinction between the mere extension of a statute and its radical alteration or amendment.

The Master found *Frost* v. *Corporation Commission* (*supra*) conclusive on the argument of estoppel. In that

case, by virtue of a statute of 1915, no one was permitted to operate a cotton ginning business in Oklahoma unless he obtained a certificate showing public necessity. In 1925 the statute was amended to provide that on the petition of 100 citizens and taxpayers stating that a gin was to be operated by them co-operatively a license should issue without a certificate of public necessity.

In 1926 the Durant Co-operative Gin Company, on a petition as required by the proviso, made an application for a license. The plaintiff, a licensed cotton ginner, offered to show a lack of public necessity. The defendant considered itself bound to issue the license nevertheless. The plaintiff then brought a suit to enjoin the defendant from issuing the license on the ground that the proviso denied him the equal protection of the laws.

This Court wrote as follows on the question of estoppel:

> "It is true that the appellant applied for and obtained a permit to do business under the statute to which it was sought to attach the proviso in question. Is he, thereby, precluded from assailing the proviso upon the ground that one who claims the benefit of a statute may not assert its invalidity? It is not open to question that one who has acquired rights of property necessarily based upon a statute may not attack that statute as unconstitutional, for he cannot both assail it and rely upon it in the same proceeding. *Hurley* v. *Commission of Fisheries*, 257 U. S. 223, 225. But here the proviso under attack, having been adopted by a subsequent act and being invalid, had no effect, as we have already said, upon the provisions of the statute * * *. In seeking and obtaining the benefits of the statute, appellant proceeded without regard to the proviso, neither affirming nor denying, nor in contemplation of law acquiescing in its validity; and his action cannot be made a basis upon which to rest a successful claim of estoppel *in pais* or of a waiver of the right to maintain the constitutional challenge here made" (at pp. 527-528).

There was a dissenting opinion. The difference appears to have been, not in the principle involved, but in its ap-

plication. Because the proviso was not part of the original statute, this Court seemed to feel that the plaintiff had a right to proceed as though it had never existed. Here, of course, the differential provision always existed.

Throughout the hearings the plaintiff insisted that though it was the 1934 Law which was being attacked, nevertheless the conditions which existed at the time of the enactment of the 1933 Law were controlling. For, if it were the conditions existing at the time of the enactment of the 1934 Law which were controlling, there was no need to conduct a lengthy trial to find out whether a differential then existed, since then concededly a differential did exist (par. 22 of the amended cnmplaint, R. 7). Here we have an acknowledgment that the laws are the same and that any test applicable to one holds also for the other. Nevertheless, the plaintiff argued that, so far as the estoppel is concerned, the same test does not apply. We cannot agree with the plaintiff. Either the laws are different, in which case the hearings were unnecessary, an established differential in existence at the time of its enactment and the 1934 Law clearly valid; or they are the same, in which case what the plaintiff did under the 1933 Law is as pertinent to the issue of estoppel as though it had been done under the 1934 Law. This is a dilemma from which there is no escape.

## CONCLUSION.

From the very commencement of this litigation the plaintiff has felt the necessity of attempting to explain away what to the ordinary citizen seems like an effort to increase milk prices by preventing those willing to buy independent milk from obtaining it a penny cheaper. In its advertisements announcing the institution of this suit the plaintiff stated:

> "In taking this action, we seek simply to make it possible for the public to buy milk of the highest

quality—Borden's Milk—at as low a price as any other milk" (Defts.' Ex. 27, R. 268).*

And this has been its public position ever since.**

Now, it seems fairly clear that the intent of these announcements was to convey the idea that all that the plaintiff is seeking is to remove the impediment which prevents it from reducing its price and so be enabled to sell as low as the independents. It seems quite clear, moreover, that that precisely was the impression which the readers of the advertisements carried away. But there is grave reason to doubt that such is the plaintiff's purpose.

The testimony shows that on three different occasions (July 14, 1933, August 23, 1933, and April 17, 1934) executives of the plaintiff appeared before the Milk Control authorities and urged that their price—the well-advertised price—for store bottled milk be increased to a point above the present price at which the not well-advertised milk is sold (R. 181, 181-186; Defts.' Ex. 23). The present price to the stores of the not well-advertised milk is 9¾¢; the price of the well-advertised milk on July 14, 1933, was 9¢; on August 23, 1933, 10¢; and on April 17, 1934, 10¢. In other words, at a time when the plaintiff was already getting more for its milk than the independents are now getting for theirs, the plaintiff was still complaining that it was not getting enough.***

---

* The plaintiff in its brief below stated: "The way to increase the sales of milk and thereby benefit *all* producers is to permit *all* milk to be sold at the lowest possible price" (p. 17; italics in original). In its brief in this Court the plaintiff states: "The competitor with an established reputation is thus denied the right to meet the price of a lesser known rival" (p. 52).

** See, for example, the statement of Mr. Cronk in the press on the day of the announcement of the Master's report; for instance, N. Y. Times, June 21, 1935.

*** At the hearing of August 23, 1933, when the price of the well-advertised Grade "B" bottled milk to stores was 10¢, Mr. Harry A. Cronk, the plaintiff's president, testified as follows:

"The Chairman:

Q. As far as the Borden's Farm Products Company is concerned, it is operating at a loss in its Grade B business?

A. That's right" (R. 186).

Public announcements notwithstanding, the purposes of the present litigation are clear. The results, in case the plaintiff should succeed, are equally clear. We have already sufficiently emphasized most of them. One we have hardly mentioned, though it is perhaps as important as the rest. The independents sell about 65 percent of the 900,000 or 1,000,000 quarts sold daily to stores. On this basis, if the plaintiff succeeds in its aim, the people of New York City who can least afford * it will have to pay about $2,500,000 per year more for their milk than they are now paying.

Respectfully submitted,

JOHN J. BENNETT, JR.,
Attorney General of the
State of New York,

by SAMUEL KRAMER,
Special Assistant
Attorney General.

HENRY S. MANLEY;
Counsel for Peter G. Ten Eyck,
Kenneth F. Fee, etc.

SAMUEL KRAMER,
HENRY S. MANLEY,
DAVID L. WEISSMAN,
of Counsel.

* A survey made by the Henry Street Settlement in 1934 covering 21,559 families in New York City shows that 13 percent of these families belonged to the $5-$10 a week income group and spent over 16 percent of their income for milk; and that 27 percent of these families belonged to the $11-$15 a week income group and spent 10 percent of their income for milk (R. 147; Defts.' Ex. 9). The survey also showed that as the price of milk increased consumption decreased (R. 147). Helen M. Harris, head worker of the Union Settlement, testified that if the differential were eliminated and all milk were sold at the higher, well-advertised price, "less milk of any variety would be consumed" (R. 196).